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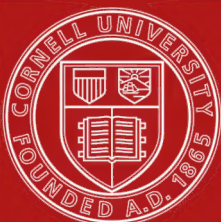
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The law of personal injuries relating to



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THE LAW
OF
PERSONAL INJURIES

RELATING TO
MASTER AND SERVANT

BY
FRANCIS
W. F. BAILEY

ONE OF THE JUDGES OF THE CIRCUIT COURT OF WISCONSIN. AUTHOR OF
"MASTER'S LIABILITY FOR INJURIES TO SERVANT"

IN TWO VOLUMES
VOLUME II

CHICAGO
CALLAGHAN AND COMPANY
1897

LA 5769

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W. F. BAILEY.

STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

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1795a. A servant may maintain an action against his fellow-servant for injuries received in his master's service.¹

1795b. A substitute hired by an employee stands in the employee's place, with all its responsibilities and liabilities so far as the master is concerned, and a fellow-servant with the employee is a fellow-servant with the substitute.²

I. RULE IN THE SEVERAL STATES.

Alabama.

1. Rule.

1796. Where two persons are employed in the same general business by a common employer, if one is injured by the negligence of the other the employer is not responsible.³

1797. First. That for his own personal negligence, causing injury to an employee, the master must respond.

Second. Where his personal fault contributes directly to the cause of the injury, though, concurring with it, there may have been the negligence of a servant engaged in the common employment, he must also respond.

Third. He is not liable for injuries proceeding from other servants in the same employment.

Fourth. Injuries resulting from such cause are of the risks incident to the employment, which it is intended the servant contemplates and consents to incur when he enters the service. There is also another and higher reason, founded on the policy of encouraging and compelling the servant to exercise diligence and caution in the exercise of his duties, which, while protecting him, affords protection also to the

¹ *Hinds v. Harbon*, 58 Ind. 121; ruled in a subsequent case. *Osborne v. Morgan*, 130 Mass. 102.
² *Griffiths v. Wolfram*, 22 Minn. 185; *Anderson v. Guineau*, 9 Wash. 304, 37 Pac. 449.
³ *Cook & Scott v. Parham*, 24 Ala. 21; *Mobile & Ohio R. Co. v. Thomas*, 42 Ala. 672; *Walker v. Bolling*, 22 Ala. 294.

Ross v. Walker, 139 Pa. St. 42. It was held otherwise in *Massachusetts* in an early case (*Albro v. Jaquith*, 4 Gray, 99), but was over-

master, such diligence being properly esteemed a better security against injury from negligence of a fellow-servant than recourse against the master for damages, where the injury has been received.

Fifth. It is the duty of the master to use ordinary care — the care which men of common or ordinary prudence exercise under like circumstances for their own protection — in the employment of competent and skilful servants, and not to continue in his service such as are known to be wanting in either reasonable skill or diligence.

Sixth. The master must use ordinary care or diligence in furnishing fit and safe materials and appliances, and, when that is employed, machinery, for the service in which the servant is engaged. This, however, is not an absolute duty. The master must not be understood as insuring or warranting the safety or fitness of the materials or appliances furnished, more than he can be regarded as promising absolutely and unconditionally that the fellow-servants are competent and diligent. When due care has been exercised in those respects, the duty to the servant is satisfied, for there is no obligation resting upon the master to be more careful of the safety of the servant than he is for his own security.

Seventh. Defects originally existing in such appliances, or which result from their use, are, like the negligence of fellow-servants, of the incident hazards of the service to which the servant must have contemplated he would be exposed.

Eighth. When such appliances have been furnished, when diligence has been observed in procuring them, the use of them is necessarily intrusted to the servants of a railroad company, as are their care and inspection and the repair of them, and determining when their use must be abandoned until repairs are made. This duty may be intrusted to those operating the appliances, or confided to other servants having no other duty but that of inspection or repair. However this may be, the several servants are in the same circle of employment, derive duty and compensation from the

same source, and are laboring for a common purpose. They are fellow-servants, and the master cannot be made liable to one for the negligence of another. The machinist in the shop, whose duty it is to repair locomotives, and the supervisor of tracks, whose duty it is to keep the road-bed in proper and safe condition, have each been determined fellow-servants of the fireman on the locomotive, for whose negligence the master could not be made liable. If the coupling or bumper of a car, or the use of a car in its defective condition, was the result of neglect or want of care of a fellow-servant — of the station-agent, the conductor of the train, the fellow-brakeman, or the car-inspector — the master is not liable.

Ninth. The burden of proving negligence rests upon the employee. Inference of it cannot be drawn from the fact of injury and from the unfit and unsafe condition of the car. This is the established doctrine, distinguishing the case of injury to a servant and that of injury to a passenger.

Tenth. The master is not bound to supply the servant with the most approved and safest appliances. Such as are safe and fit, not exposing the servant to greater perils than are usually incident to the service, is the measure of duty.

It is not the relative grades of different officers or employees, or the subordination of one to the other, which determines when they are fellow-servants in relation to their common employer, but it is the nature of the duty intrusted to them. Those officers or agents who represent the master in the selection of other servants or employees, or in furnishing appliances in the first instance, while in the performance of such duties are not fellow-servants with those otherwise employed.¹

2. Duties Personal to the Master — Vice-principals.

1798. Where there is a general manager or superintendent who is invested by the common employer with the duty

¹ *Smoot v. Railway Co.*, 67 Ala. 13.

and authority of employing and discharging inferior agents and servants who are under him, the master is responsible for the acts of negligence on the part of the superintendent in failing to exercise due care and diligence in the employment of competent agents, or in not dismissing those who are proved to be incompetent.¹

1799. Whoever exercises the power of appointing and removing employees or servants, though his grade of employment, as to other matters, makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employees are the negligence or mistakes of the corporation.²

3. Fellow-servants.

1800. It was held that employees operating an engine, and the mechanics in the machine shop whose duties were to repair defects in such appliances, were fellow-servants, where the latter had failed to make proper repairs. . In fact, the department theory was repudiated. The court also remarked that the proposition which bases the liability on the superiority of grade of the negligent servant, and the subordination to him of the injured servant, was not founded on adequate reason.³

1801. It was held that the supervisor of a railroad, who was in charge of a train which was examining the road after a heavy rain, was the fellow-servant of the fireman who was injured by the locomotive going into a washout. It was said that when the duties intrusted to an officer are such as cannot be performed by the corporation itself, then his negligence is not that of the corporation, unless it has failed in due care in his selection. Nor is it the relative grades of different officers or employees, or the subordination of one

¹ Walker v. Bolling, 22 Ala. 294.

³ Mobile & Ohio R. Co. v. Thomas,

² Tyson v. South & North Ala. R. Co., 61 Ala. 554. 42 Ala. 672.

to the other, which determines when they are fellow-servants in relation to their common employer, but it is the nature of the duty intrusted to them. Hence, it was held that the superintendent was a person on whose skill the company must rely, and that in performing his duties in respect to the train and in giving orders to the overseer he was but a fellow-servant.¹

1802. Where appliances have been furnished, where diligence has been used in procuring them, the use of them is necessarily intrusted to the servants of a railroad company, as is their care and inspection and the repair of them, and determining when their use must be abandoned until repairs are made. This duty may be intrusted to those operating the appliances, or confided to other servants having no other duty than that of inspection or repair. However this may be, the several servants are in the same circle of employment, derive duty and compensation from the same source, and are laboring for a common purpose. They are fellow-servants, and the master cannot be made answerable to the one for the negligence of the other. The machinist in the shop, whose duty it was to repair locomotives, and the supervisor of the track, whose duty it was to keep the road-bed in proper and safe condition, have each been determined fellow-servants of the fireman on the locomotive, for whose negligence the master could not be made liable.

The facts were that a train-hand was injured in the attempt to couple cars, caused, as was alleged, by the defective condition of the bumpers. In referring to the facts it was said: "If, therefore, the coupling or bumper of the car causing the injuries of which the appellee complains, or the use of the car in its defective condition, was the result of the neglect or want of care of a fellow-servant, of the station-agent at Greenville, the conductor of the train, the fellow-brakeman or the car inspector at Pollard Junction, each and all of whom were engaged in the same common service and the same general business, the appellant cannot be made

¹ Mobile & Ohio R. Co. v. Smith, 59 Ala. 245.

liable unless negligence can be imputed to it, concurring with their negligence.”¹

1803. Under the laws of Alabama (so decide the Tennessee court) the car inspector, the brake repairer and the brakemen are fellow-servants.²

1804. Where the contention was that a conductor in the control of a train out on the road is in the shoes of the company, and a vice-principal, to whom the law will impute the knowledge of all facts as to the roadway, etc., which are known or ought to be known to the company itself, it was said: But our own cases and perhaps the weight of authority generally support a contrary view, at least to the extent of holding, without regard to grade or rank and whether the element of personal control enters into the consideration or not, all who are servants of the common master, engaged in the same general business, subject to the same general control, and are paid out of the common fund, are fellow-servants in respect to all acts done in the common service, unless the duty performed by them be such as properly applies to the master as such, and in which case they take the place of the master, and he is chargeable with their acts as if performed by him personally, with all knowledge in the premises which the law imputes to him.³

4. Statute.

1805. SEC. 2590. When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee as if he were a stranger, and not engaged in such employment, in the cases following:

First. When the injury is caused by reason of any defects in the ways, works, machinery or plant connected with or used in the business of the master or employer.

¹ *Smoot v. Mobile & Ohio R. Co.*,
67 Ala. 13.

³ *Georgia Pac. R. Co. v. Davis*, 92
Ala. 300, 9 So. 252.

² *Nashville, Chattanooga & St. L.
R. Co. v. Foster (Tenn.)*, 10 Lea, 351.

Second. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

Third. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee at the time of the injury was bound to conform, and did conform, if such injuries resulted from his having so conformed.

Fourth. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations and by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with authority of the master or employer in that behalf.

Fifth. When such injury was caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal points, locomotive, engine, switch, car or train upon a railway, or any part of the track of a railway.

But the master or employer is not liable under this section if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself, engaged in the service or employment of the master or employer, unless he was aware that the master or employer or such superior already knew of such defect or negligence.

Nor is the master liable under subdivision 1, unless the defects therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

1806. SEC. 2591. If such injury results in the death of the servant or employee, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debt or liabilities, but shall be distributed according to the statute of distribution.

1807. SEC. 2592. Damages recovered by a servant or employee of and from the master or employer are not subject to the payment of debts or any legal liabilities incurred by him.

1808. The general principles regulating, in all classes of cases defined by statute, the rights and duties of the employee and the liability of the employer, and also the defenses available to him, as declared by our former decisions, may be summarized as follows: Though the statute has no application to known risks and dangers of the service or employment, against which human skill and caution cannot provide, when an employee sustains injury by reason of any defect in the ways, works, machinery or plant, caused by the negligence of any of the persons mentioned, and under the circumstances provided by the statute, it abrogates the common-law rule that the employee impliedly contracts to assume the known and ordinary risks incident to the employment. In neither of the classes of cases, however, does any liability for injuries caused by the known and ordinary risks arise without negligence on the part of the employer, or of some person intrusted with superintendence or authority to give orders or directions, or having charge or control of some signal point, locomotive, engine, car or train upon the track of a railway, or by reason of the act or omission of some person, done or made in obedience to the rules, regulations or by-laws of the employer, or to particular instructions of a person delegated with authority in that behalf. The scope and operation of the statute is to make the employer answerable in damages for an injury caused by his own negligence or the negligence of a co-employee of the same or superior grade in the enumerated classes of cases. In all cases the employee is bound to use ordinary care for

his own protection. If there are two ways of discharging the service apparent to the employee, one dangerous, the other safe or less dangerous, he must select the safe or less dangerous way. . . . To entitle the plaintiff to recover by virtue of the statute, he must both aver and prove a case coming within one of the enumerated classes of cases. Where the charge is negligence in giving directions or orders, "it is incumbent on plaintiff to show (1) that the person who gave the orders or directions was in the service or employment of defendant; (2) that he was bound to conform to the orders of such person; (3) that he did conform to such orders, and that his injuries resulted from having so conformed, and (4) that the person was negligent in giving the orders or directions."¹

1809. This statute has no application to known risks and dangers of the service against which human skill and caution cannot provide, but renders the employer liable for injuries resulting from his own negligence, express or implied, in the particular acts stated. Nor does it relieve the employee from the duty of using ordinary care for his own protection in the service.²

1809a. Under the statute the master's liability is made absolute for the negligence of one having control of an engine. The question of the care exercised in his employment is immaterial.³

1810. Under section 2590, subdivision 1, which makes the master liable for an injury to a servant caused by defective machinery; provided that such defect arose from or was not discovered by reason of the master's negligence, a complaint which alleges that plaintiff's injury was occasioned by a defect which was known to the defendant, or which could have been known by the exercise of reasonable diligence, is not sufficient, in the absence of any further allegations of

¹ Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145.

³ Culver v. Alabama Midland R. Co. (Ala.), 18 So. 827.

² Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145.

negligence, for the reason that the defendant after discovering a defect must have had reasonable time to remedy it before it could be said to be negligence, under said section, subdivision 2, which makes the master liable when the injury is occasioned by reason of the negligence of any other servant who has any superintendence intrusted to him.

A complaint which alleges that the plaintiff, while engaged as a fireman on one of defendant's engines, was injured by reason of the negligence of the foreman who was intrusted with the superintendence over the plaintiff and over the said engine, in allowing it to be and remain in a defective condition therein described, is sufficient.¹

1811. Where it is the duty of the fireman to receive signals from switchmen coupling and uncoupling cars and to transmit them to the engineer, the railroad company is liable for injuries to a switchman caused by the fireman's failure to transmit a signal. It was held that such injury is clearly within the provisions of the statute.²

1811a. Where it appears that it is the duty of the fireman to receive signals from a switchman and transmit them to the engineer, he is for such purpose a person in charge of the engine under the statute.³

1812. Where the claim for damages is predicated on the negligence of defendant's yard-master in placing a car on a side-track and allowing it to remain in dangerous proximity to another track, it was said: That the foreman or yard-master was intrusted with superintendence in the placing and position of cars necessarily implies that he was intrusted with the superintendence of the men and appliances used in placing the particular car that caused the injury, and not that his superintendence related only to inanimate things, and this is sufficient to bring the action within subsection 2 of the code. It is not necessary that it appear that the su-

¹ *Seaboard Mfg. Co. v. Woodson*,
94 Ala. 143, 10 So. 87.

³ *Brown v. Louisville & N. R. Co.*
(Ala.), 19 So. 1001.

² *Richmond & D. R. Co. v. Jones*,
92 Ala. 218, 9 So. 276.

perintendent is over the person who complains of the negligence of the person intrusted with it. A movable object, such as a car on a side-track, temporarily in dangerous proximity to a railroad track, is a defect in the condition of such track or way, and the complaint in an action for injuries caused by such obstruction need not state a case under subsection 1 in this respect. (*Railroad Co. v. Walters*, 91 Ala. 435, followed.)

If a person who has charge or control of a car only for the purpose of bringing it to "rest" on a track places it in a dangerous position thereon and an injury results in consequence, it is actionable negligence within subsection 5.¹

1813. A hand-car is a car within subdivision 5, allowing recovery by an employee of his employer for personal injuries received in the employment by reason of the negligence of another employee of the same person having charge of an engine, car or train on a railway.²

1814. It was the duty of an engineer in charge of several blowing-engines in one room, if any one need repair, to disconnect it from the steam supply and turn it over to the repairer, and, pending repairs, prevent interference by others. The repairer secured the engine either by inserting timbers into the fly-wheels, or by propping the piston-rod with a timber. The engineer had disconnected the steam from an engine, and the deceased, a repairer, had propped the piston-rod. In some way the steam became reconnected, and the piston descended, crushing the prop and killing the repairer, who was in the air-cylinder. It was held that, since the accident could have occurred only by such reconnection, and a competent person was provided to prevent it, the employer had not negligently failed to provide deceased a safe place to work. Since the deceased's act in going under orders into the cylinder, where he was killed, was not the proximate cause of his death, but the supervening negligence of another, or unaccountable accident, there could be no recovery

¹ *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88. ² *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

under subdivision 4, making the employer liable when the injury is caused by an act or omission of any servant in obedience to particular orders of a vice-principal.

An engineer actually operating engines with his own hands by the aid of a helper, as directed by persons superior to him in the common employment, is not a person who has any superintendence intrusted to him so as to make the master responsible to a person other than a helper for his negligence while in the exercise of such superintendence, under subdivision 2.¹

1815. A city is not liable to a laborer in its employ for an injury inflicted through the negligence of a co-servant, but only for the negligence of such employees as it intrusts with the superintendence of the work, since its liability in such cases does not depend upon the duties it owes the public, but upon the principles applicable to master and servant.²

1816. A railroad company is liable for the death of a fireman which is caused by the negligence of an engineer or conductor of a train.³

1817. Under subdivisions 2 and 5 it was held that a railroad company was liable for the death of a laborer caused by the collision of a hand-car on which he was riding by the direction of the boss with a train which they were liable to meet at any moment, but which the boss had failed to prepare for by stationing flagmen in front of the car as prescribed by rules of the road.⁴

1817a. Where an employee was injured while riding on the foot-board of an engine by his feet striking against an oil-box left near the track in the company's yards, it was held that a cause of action was not presented under the statute; that the defect complained of was not a defect in the track, and therefore not within the provision which

¹ *Dantzler v. De Bardeleben Coal & Iron Co.*, 101 Ala. 309, 14 So. 10.

² *City Council of Sheffield v. Harris*, 101 Ala. 564, 14 So. 357.

³ *Perdue v. Louisville & N. R. Co.*, 100 Ala. 535, 14 So. 366.

⁴ *Richmond v. D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577.

makes the master liable for injuries to his servant caused by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the master.¹

Arizona.

1818. A preference is expressed for the Illinois rule. The *Ross Case* in the federal court referred to approvingly. No rule stated. In a later case (*McGill v. Railway Co.*, 33 Pac. 821) it is stated that the doctrine in the *Ross Case* was applied.²

1819. It was held that a section foreman, injured through the misconduct of the conductor of a train upon which the former was riding, in hurriedly directing him and his men to get on the train, so as to get his train out of the reach of an approaching train, was not the fellow-servant of such conductor. The *Ross Case* was approved. In addition, the reasoning was that he had no duties to perform on the train, and was not as to his duties subject to the control or direction of the conductor.³

1819a. Where a conductor and foreman of a section crew were engaged in clearing the track of a wreck on a section of the road under the latter's charge, they being under control of a superior, and the foreman was injured while riding on a train in charge of such conductor from the place of work, it was held they were fellow-servants.⁴

Arkansas.

1. Duties Personal to the Master — Vice-principals.

1819b. Where the performance of duties peculiar to the master, and properly appertaining to him as such, is intrusted to one who is in other respects a mere workman upon the

¹ *Louisville & N. R. Co. v. Boul-*
den (Ala.), 20 So. 325.

² *Hobson v. Railway Co. (Ariz.)*,
11 Pac. 545.

³ *McGill v. Southern Pac. R. Co.*
(Ariz.), 33 Pac. 821.

⁴ *Southern Pac. Co. v. McGill*
(Ariz.), 44 Pac. 302.

footing of others, such workman, *quo ad hoc* and to the extent of the master's duty intrusted to him, stands in the master's place and his negligence binds the master.

Whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middle-man whom he has selected as his agent; and to the extent of his discharge of these duties by the middle-man, he stands in the place of the master, but as to all other matters he is a mere co-servant; and the question is not whether the master reserved oversight and discretion to himself, but whether he did in fact clothe the middle-man with power to perform the duties as to the servant injured.

It was held that an instruction in effect that a foreman who had temporary charge of the mill, but receiving directions from the master, was a vice-principal, was error.¹

1819c. A foreman of a crew engaged in driving piles for trestles for a railroad company, whose business extends to many bridges, and who has charge of all the men in the crew, including the train-men when co-operating with the other men in building and repairing trestles, is a vice-principal, for whose negligence while in charge of such crew the company is liable to the member thereof who is injured thereby.

It was said: "The material question was whether the offending servant was a mere foreman overseeing a gang of laborers, or was an agent of the company, clothed with its authority in the management and supervision of such part of its business, as to make him the company's representative. If he occupied the former position, the laborers had assumed the risk of his negligence, but in the latter case he was a vice-principal. And if he was guilty of negligence in that capacity the company is liable. We think, in determining this question, no importance should be attached to the incident

¹ Fones et al. v. Phillips, 39 Ark. 17.

of the work, but rather whether the work was such as required a skilful or careful supervision; and where such supervision is necessary to the safety of the laborers engaged upon the work, it is the master's duty to bestow it, and if he appoints an agent to perform that duty he is responsible for his negligence."¹

1820. A train-dispatcher who controls the movement of trains represents the company, and is not a fellow-servant of an engineer injured in a collision resulting from his negligence.²

1821. It is broadly stated that, in railroading, on account of its dangers and complications and number of men engaged, the duty of the company to its employees requires control, direction and supervision on the part of the company. This duty is personal, and, if delegated, the company remains responsible for the manner of its exercise. Therefore, the question as to who is a vice-principal or fellow-servant in any given case is mostly, if not altogether, a matter of fact, each case standing on its own set of facts.³

1822. One who has the power to employ and discharge laborers is the vice-principal, as regards the duty to warn such laborers of special risks in their employment.⁴

1823. The superintendent of car repairs in a railroad company's yards complained of the violation of the rule prohibiting switching on the repair tracks without permission from the foreman of repairs. The yard-master was ordered to enforce this rule and have the cars on the repair tracks moved at a certain hour each day; and at that hour he sent a switchman and engineer with an engine to move cars under the direction of the foreman of repairs, who ordered them to move certain cars, and warned them against going upon the track where deceased was working under a jacked-

¹ *Bloyd v. St. Louis & S. F. R. Co., v. Hammond*, 58 Ark. 324, 24 S. W. 58 Ark. 66, 22 S. W. 1089. 723.

² *Little Rock & M. R. Co. v. Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106. ⁴ *Barry*, 58 Ark. 198, 23 S. W. 1097.

³ *Kansas City, Ft. S. & M. R. Co.*

up car. Soon after the switchman threw the switch, and, without warning deceased, caused a train of cars to be backed against the car, which fell and killed such repairer. It was held that the company was liable. The particular ground upon which this ruling was based appears to be, that as it was known that the rule was not effectual as a means of protection, it was the duty of the yard-master to personally supervise this particular work, and as to such duty of supervision it was personal to the master.¹

2. Fellow-servants.

1824. A brakeman and car-repairer are fellow-servants, and each assumes the risk of the other's negligence in the performance of his services, and the company is not liable to either for the negligence of the other. Car-inspectors are not placed in charge of a separate department of the company's business, nor do their duties require any special mechanical skill. They make a general cursory examination of the cars upon arrival at the yard so as to detect any patent defects.²

1825. One employed by a railroad company as foreman over a crew whose duty it is to repair bridges and trestles, and who, for such purpose, is supplied by the company with cars in which he boards the crew, the company moving the cars as required, is a fellow-servant of the engineer of a train which collides with the one to which the cars are attached, and cannot recover for personal injuries received.³

1826. A yard inspector whose duties are to inspect all cars as soon as they arrive, repair all slight defects he finds in them, and in case of more serious defects mark them B. O. and have them sent to the repair shops; and a yard-master whose duties are to make up trains in the yard, couple cars and move cars marked B. O. to the repair tracks, neither of whom is subject to the orders of the other, are fellow-

¹St. Louis, A. & T. R. Co. v. Trip-lett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266.

²St. Louis, I. M. & S. R. Co. v. Gaines, 46 Ark. 555.

³St. Louis S. W. R. Co. v. Henson (Ark.), 32 S. W. 1079.

servants, and neither can recover for the other's negligence. It was said: "While we recognize the liability of a railroad company for the wilful or negligent default of its chief inspector, and those deputed to supervise the condemnation of tools and rolling-stock, etc., we cannot assent to the proposition that every yard inspector on a line of a railroad is a vice-principal."¹

1827. Where the foreman of a gang of bridge-carpenters, employed by a railroad company, took up the slack of a rope suspended across the railroad track on the bridge which he and his men were repairing, and wrapped the lower end of it around a brace of the bridge for the purpose of holding it while an engine passed under it, it was held that in so doing he was not performing the master's duty, but an act of labor in common with the labor of such carpenters, and as to such act he was their fellow-servant.²

1828. Where the railroad company's car-repairers work under the control of the foreman of its round-house, who also has the power to employ and discharge such men, and a car-inspector who also works under such foreman, and whose duty it is to inspect the cars and call the attention of the car-repairers to defects, and superintend the repairs, is the fellow-servant of such car-repairers.³

California.

1. Rule.

1829. An employer is not liable to his employee for injuries resulting from the negligence, carelessness or unskillfulness of a fellow-employee engaged in the same general business, but the employer must exercise due care and prudence in the selection of competent servants. The risk is assumed as a part of the contract of service.⁴

¹St. Louis, I. M. & S. R. Co. v. Rice, 51 Ark. 467, 11 S. W. 699.

³Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250.

²St. Louis, A. & T. R. Co. v. Torrey, 58 Ark. 217, 24 S. W. 244.

⁴Yeomans v. Contra Costa S. N. Co., 44 Cal. 71.

1830. This rule was applied where a helper in a foundry was injured by the negligence of a driver of a cart, both serving under the same master.¹

1831. Where it does not appear by the complaint that the injury to a servant was occasioned by the neglect of a fellow-servant, in order to raise the issue it is incumbent upon the defendant to make the proper averments in the answer.²

1832. In an action for negligence by a servant against his master in maintaining a defective appliance, the fact that the injury was caused by the negligence of a fellow-servant is an affirmative defense, and the burden of proof is upon the defendant to establish it, and not upon the plaintiff to prove that the injury was not caused by the negligence of the fellow-servant.³

1833. In so far as a foreman is authorized and employed to prepare the places in which the other servants are to work, or to furnish the machinery or appliances with which they are to work, he represents the master, who is chargeable for the consequences of his neglect of duty in these respects; but where such foreman serves in the places or with the appliances furnished by the master, he is a fellow-servant with the other employees.⁴

1834. Whether the negligent act of a section-foreman of a railroad company by which an accident is caused to a section-hand is a personal duty which the company owes to the section-hand as its employee, or whether the accident is "in consequence of the negligence of another person employed by the same employer," within the meaning of section 1970 of the Civil Code, must be determined, not from the grade or rank of the section-foreman, but from the character of the act causing the injury. If the act is one which it is the duty of

¹ Hogan v. Central Pacific R. Co., 49 Cal. 128.

³ Bjorman v. Fort Bragg Red Wood Co., 104 Cal. 626.

² Conlin v. S. F. & S. J. R. Co., 36 Cal. 404; Brown v. Central Pac. R. Co., 68 Cal. 171.

⁴ Nixon v. Selby Smelting & Lead Co., 102 Cal. 458.

the company to perform towards the section-hand, the section-foreman, in performance of such duty, acts as the agent of such company, for which the employer is responsible; but if it is not one of the duties of the company, the foreman and section-hand are fellow-servants, and the foreman is alone responsible for an accident to the section-hand resulting therefrom.

The law recognizes no distinction growing out of the grades of employment of the respective employees, nor does it give effect to the circumstance that the fellow-servant through whose negligence the injury was received was the superior of the plaintiff in the general service in which they were both employed.

The duties which a railroad corporation owes its servants and which it is required to perform are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servants are employed, and to make such provisions for the safety of employees as will reasonably protect them against the dangers incident to their employment.

The performance of these duties cannot be shifted by it to a servant so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service, impliedly assumed by the employee by his contract of employment.

Hence, it was held that a foreman of a section crew and a section-hand were fellow-servants, where the neglect of duty which caused the injury was that of the foreman in leaving a switch open, causing injury to the latter.¹

2. Duties Personal to the Master — Vice-principals.

1835. A corporation is liable to an employee for negligence of its agents intrusted with the performance of duties

¹ *Davis v. Southern Pac. R. Co., v. California Horse Shoe Co.*, 105 98 Cal. 19. See, also, *Burns v. Sen-* Cal. 77.
nett & Miller, 99 Cal. 362; *Mullin*

which the corporation should perform as master. As to such acts, the agent occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner in which the acts are performed.

An officer having charge of a department of business is the person required to use that degree of diligence in relation to employees, machinery and appliances which is necessary to exempt a company from liability for their negligence. He is not a fellow-servant with those employed under him, and the master is answerable to all the under-servants for the negligence of such managing assistant, either in his personal conduct within the scope of his employment or in the selection of other servants.

These rules were declared where the facts were that an employee in a mine was injured, occasioned by the neglect of the superintendent to furnish and maintain suitable and safe appliances.¹

1836. The rule was applied where an employee was injured, as the court found, by the unskilful, improper and negligent manner in which the railroad company, defendant, his employer, constructed its road. In such a case the rule exempting the master from liability for an injury to a servant, caused by the negligence of a fellow-servant, has no application.²

1837. It is the duty of an employer to furnish a safe and suitable place for his employee to work, and suitable and safe appliances and machinery for him to work with, and the employer cannot be exonerated from liability to an employee for breach of this duty by delegating it either to a superior officer, agent or servant, or to a subordinate agent or servant; and the person to whom such duty is delegated, who undertakes or omits to perform it, is the representative of the employer, and not a fellow-servant with the one who is injured as the result of the breach of such duty.

¹ *Beeson v. Green Mountain G. Co.*, 63 Cal. 96; *Rodgers v. Central M. Co.*, 57 Cal. 20. *Pac. R. Co.*, 67 Cal. 607.

² *Trask v. California Southern R.*

The facts were that a boy was sent to adjust a belt upon a wheel, and was injured by reason of the platform upon which he stood being defective, in that the planks were not fastened, and one of them tipped over, causing the boy to fall.¹

1838. A train-dispatcher and material-man on a railroad, having authority to employ and discharge and direct the movement of the train-hands, is not a fellow-employee with an ordinary track laborer. The facts were that an extra train was sent out by the train-dispatcher and showed no light except the usual conductor's light, which was easily mistaken for a light at the side of the road, and came in collision with a section-man. The cause of the injury was attributed to the train-dispatcher giving the order, and in not personally seeing that a light was provided.²

1839. It was held that a foreman of a gang of men to whom a stevedore delegated the entire management of the work of unloading a vessel, with full discretion to control and supervise it, was not a fellow-servant with his subordinate employees.³

1840. The neglect of a superintendent or foreman to give proper instruction to an inexperienced servant is chargeable to the master upon the ground that duties of that character are personal to the master, which he cannot delegate so as to relieve himself from the responsibility for a failure to properly perform them.⁴

1841. Where defendant's representative employed a carpenter to construct all the scaffolds used in the construction of a large building, it was held he was a vice-principal and not a fellow-servant of a hod-carrier injured by the unsafe manner in which one of such scaffolds was constructed.⁵

¹ *Mullin v. California Horse Shoe Co.*, 105 Cal. 77.

² *McKune v. California Southern R. Co.*, 66 Cal. 302. This case criticised in *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360.

³ *Brown v. Sennett*, 68 Cal. 225. This case criticised in *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360.

⁴ *Ingerman v. Moore*, 90 Cal. 410.

⁵ *McNamara v. MacDonough*, 102 Cal. 575.

1842. It was held to be the duty of the owner of a saw-mill to furnish suitable machinery for the use of his employees, and that he could not divest himself of the liability for injuries to an employee, caused by defective machinery, by intrusting the performance of that duty to servants. A sword or guide used for keeping apart logs being cut by a circular saw was alleged to have been defective in construction.¹

1842a. Where, in the absence of the general superintendent and manager of an establishment for the making and storage of ice, the engineer was in control of a gas generator therein, who directed work to be done upon it by inexperienced employees, it appearing he had the same power of control in the absence of the manager as when the latter was present, it was held he was not the fellow-servant of one of such employees who was injured by the explosion of such generator, caused by the improper manner in which he did the work.²

3. Fellow-servants.

1843. A brakeman and conductor on a railroad train are fellow-servants.³

1844. It was held that the boss of a tool-room connected with a boiler shop was the fellow-servant of a child twelve years old, placed at work under his control, where it appeared that such boss, without any direct authority, directed the boy to perform work in another department, and was set to work by an employee thereof to assist in working upon a dangerous machine, whereby he was injured.⁴

1845. The foreman of a mine and a miner employed to work under his direction are fellow-servants.⁵

1846. A laborer employed by a railroad company to remove snow and other obstructions from its track is a fel-

¹ Sanborn v. Madera F. & T. Co., 72 Cal. 523; Congrave v. Southern Pac. R. Co., 88 Cal. 360.
70 Cal. 261.

² Ryan v. Los Angeles I. & C. Co., 112 Cal. 244.
⁴ Fisk v. Central Pac. R. Co., 72 Cal. 38.

³ Brown v. Central Pac. R. Co.,
⁵ Stephens v. Doe, 73 Cal. 26.

low-servant, and employed in the same general business with a track-walker and train conductor, where injury is caused to the former by the combined negligence of the latter.¹

1847. An engineer and conductor upon a railroad train are fellow-servants, where the latter is injured by the negligence of the former.²

1848. An engineer of a mining company employed to operate an engine and hoisting tackle, used to hoist rocks and debris from the mine and to raise and lower miners, is a fellow-servant with a workman in the mine, injured by the negligence of the engineer in hoisting him.³

1849. A helper in a foundry, and the driver of a horse and cart employed in connection with the work at the foundry, were held to be fellow-servants, where the former was injured by the negligence of the latter in the manner in which he managed the horse.⁴

1850. A fireman and an engineer of a ferry-boat are fellow-servants, and the fact that the engineer employs and discharges the firemen who work under him, at will, does not alter their relation as such.⁵

1851. Employers are not liable for an injury caused by the negligence of a fellow-servant, and the grade of work of the employee is an immaterial circumstance, as the employer is not liable for injury to an employee caused by the negligence of a foreman, even if he had entire charge and control of the work, with full power to hire and discharge men, if his competency is not questioned. This was said where, under the direction of a foreman, an unsafe scaffold was constructed, whereby a painter was injured.⁶

1852. A mate of a vessel engaged in carrying passengers and freight upon the ocean, and a servant employed in the

¹Fagundes v. Central Pac. R. Co., 79 Cal. 97.

²Long v. Coronado R. Co., 96 Cal. 269.

³Trewatha v. Buchanan G. M. & M. Co., 96 Cal. 494.

⁴Hogan v. Central Pac. R. Co., 49 Cal. 128.

⁵Stevens v. San Francisco & N. P. R. Co., 100 Cal. 554.

⁶Noyes v. Wood, 102 Cal. 389; Nixon v. Selby Smelting & Lead Co., 102 Cal. 458.

steward's department of the same vessel, are fellow-servants, employed, within the meaning of the law, by the same employer, in the same general business, and hence the owner of the vessel is not responsible for any injury caused to such servant by falling down an open hatchway which the mate had neglected to guard while taking in cargo.¹

Colorado.

1. Rule.

1852a. After referring to the rule established in several of the states, it is said: The better rule, as we extract it from the best-reasoned cases, is that for the acts of the vice-principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable; while for all such acts as relate to the common employment and are on a level with the acts of the fellow-laborer, except such acts done by the vice-principal against the reasonable objection of the injured servant, the master is responsible. In other words, the test of the liability is the character of the act rather than the relative rank of the servant.²

2. Duties Personal to the Master — Vice-principals:

1853. The defendant in extending its line of railroad placed the full charge of laying the track in charge of an employee. He had two foremen and quite a number of men at work under him, whom he employed and discharged at pleasure. He also had charge of the cars and tools. One of the workmen was injured, caused by the appliance used to check the speed of a car, upon which he was working, being removed on a steep grade, by the direct command of such superintending employee, whereby the speed of the car could not be checked and it came in contact with another

¹ *Livingston v. Kodiak Packing Co.*, 103 Cal. 258.

² *Deep Mining & Drainage Co. v. Fitzgerald* (Colo.), 43 Pac. 210.

car. It was held that such superior servant was a vice-principal, and the company was liable.¹

1854. Where, in the absence of the superintendent of construction of a line of road, the workmen employed in constructing it are performing their labor under the supervision and direction of a general foreman, who has full power and authority to employ and discharge them, such foreman is, in relation to such men, the representative of the company, and not their fellow-servant.²

1855. The duties on the part of the master, in relation to furnishing appliances and maintaining them in suitable repair, and inspecting them to determine their condition, are personal to the master, and the agents who are charged with this duty are not fellow-servants with those employed to labor in the business whenever such appliances are used, or, in some cases, with those engaged to operate the same.³

1856. The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured does not alone fix the master's liability. The general powers vested in the superior servant, and the character of the specific act in connection with which his negligence occurs, are considerations rarely, if ever, omitted in pursuing the inquiry. The rule is that when the negligent agent or servant can fairly be said to take the place of the master, and represent him so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach. What influence the power vested in a servant to hire and discharge servants has in determining the question is not stated, though the question is mentioned.⁴

1857. A person employed by a mine-owner to timber a drift, so as to provide a safe place for the miners running the shaft to work in, is not a fellow-servant of the miners.⁵

¹ Denver, S. P. & P. R. Co. v. Discoll, 12 Colo. 520, 21 Pac. 708; ³ Wells v. Coe, 9 Colo. 159, 11 Pac. 50.

Colorado Midland R. Co. v. Naylor, 17 Colo. 501, 30 Pac. 249. ⁴ Colorado Midland R. Co. v. Naylor, 17 Colo. 501, 30 Pac. 249.

² Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701. ⁵ Grant v. Varney (Colo.), 40 Pac. 771.

3. Fellow-servants.

1858. Where it appeared that a workman in a mine was killed by the negligence of a mine boss, appointed under the coal mining act of 1885, which compels his appointment, makes it his duty to attend to the mine and make it safe to work in, and subjects him to punishment in case of failure, and it does not appear that he had any authority over the workmen other than that prescribed by the statute, he and such workmen are fellow-servants, and the company is not liable for his negligence.¹

1858a. A teamster engaged in hauling coal, and an employce in charge of the boilers for a tramway company, were held to be fellow-servants.²

Connecticut.

1. Duties Personal to the Master — Vice-principals.

1859. The rule which exempts the master from liability for the negligence of a fellow-servant applies not only in cases in which the servant injured is engaged in the same grade of employment as the servant whose negligence occasioned the injury, but also in cases in which the two servants are engaged in different grades of employment, if the services of each are directed to the same general end. It also applies to cases where the injured servant is of a grade of the service inferior to that of the servant whose negligence occasioned the injury, though the inferior in grade is subject to the orders of the superior. And it is not essential, in order to exempt the master from liability, that the injured servant at the time of receiving the injury should be engaged in the same particular work as the servant by whose negligence the injury was occasioned. If both servants are in the employment of the same master, work under the same control and in the same general business, and derive authority and

¹Colorado Coal & Iron Co. v. Lamb (Colo.), 40 Pac. 251.

²Denver Tramway Co. v. O'Brien (Colo. App.), 44 Pac. 766.

compensation from the same common source, the master is not liable. But this rule has no application where the servant sustains an injury through the master's negligence alone, or through the negligence of the master combined with the negligence of a fellow-servant. In respect to appliances furnished for use of his employees, the master's duty is that of reasonable care to provide such as are suitable. This duty is for the master to do by himself or some other. When it is done, and not till then, his duty is met or his contract kept.¹

1860. The duty is personal to the master to exercise reasonable care to provide a safe place for his servant to work. The performance of this duty cannot be affected by the simple giving of an order, its execution being intrusted to another. Until the agent thus selected in fact acts up to the limit of the duty of his master to act, the master's duty is not done. The master's duty requires performance.²

1861. It was held that a train-dispatcher was not the fellow-servant of an engineer upon one of defendant's engines. It was said: "The train-dispatcher in respect to the running of trains was supreme. The whole power of the corporation whose duty it was to move them safely was delegated to him. He was the agent through whom it attempted to perform its duty. He acted in its name, by its authority and in its stead. The engineer was bound to obey his order. Reason, justice and law require that the company should be held responsible."³

2. Fellow-servants.

1862. A foreman whose duty it is to prepare dynamite cartridges for blasting, and to direct the work of certain laborers, though not to hire and discharge, was held to be a fellow-servant of such laborers. It is not the rank or grade

¹ Wilson v. Willimantic Linen Co., 50 Conn. 433.

³ Darrigan v. New York & N. E. R. Co., 52 Conn. 285.

² McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094.

of the offending servant, but the character of the particular act or omission to which the injury is attributable, that determines the question of the master's responsibility.¹

Delaware.

1. Vice-principals.

1863. Those who perform duties personal to the master are, in respect to such duties, vice-principals. The doctrine of superior and subordinate is not discussed. A general manager or overseer or superintendent of machinery represents the master.²

Florida.

1. Rule.

1864. A fellow-servant is one engaged with another under a common master and in the same common employment, so that they are brought into contact with each other, notwithstanding they are subject to the orders and under the exclusive control of separate bosses and foremen and at different work in the same service. For illustration: If one was engaged as a common laborer to work on the road-bed or a gravel train, he could not be a fellow-servant with the engineer or conductor on a passenger train, but would be a fellow-servant with all employed on the road-bed or gravel train, if his employment was in a common work and brought him in immediate contact with them and risk through them, although working under orders of a different boss or foreman in the said common work. It was held that one of the shovelers upon a gravel train and the engineer were fellow-servants in respect to the act of the engineer in putting the handling of his engine into the hands of his fireman, who was either careless or unskilled in the management of such machines.³

¹ *Sullivan v. N. Y., N. H. & H. R. Co.*, 62 Conn. 209, 25 Atl. 711.

³ *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. 696.

² *Foster v. Pussey*, 8 Houston (Del.), 168, 14 Atl. 545.

2. Duties Personal to the Master — Vice-principals.

1865. At common law whenever the master delegates to an officer, servant, agent or employee, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent or employee stands in the place of the master and becomes a substitute of the master, and the master is liable for his acts of negligence.¹

3. Fellow-servants.

1866. Where an engine-wiper was injured while wiping an engine upon a track (which act he was requested to do by the engineer) by cars attached to another engine under the control of the said engineer being moved against it, it was held that no recovery could be had, as they were fellow-servants. It was said: "It is not necessary to bring a case within the rule that the employer is not responsible to those in his employ for injuries caused by the negligence or misconduct of his fellow-servants, if the one who causes and the one who suffers the injury should be at the time working together in the same particular work. It is sufficient if they are in the employment of the same master engaged in the same common enterprise, and both employed to perform duties tending to accomplish the same general purpose."

Whether or not the rule in relation to vice-principals exists in this state was not decided.²

1867. The engineer, fireman and brakeman of the same train are fellow-servants, and the defendant company was held not liable in damages to one of such fellow-servants for injuries sustained in the line of his employment, in consequence of the negligence of the engineer in putting his un-

¹ Duval v. Hunt, 34 Fla. 85, 15 So. 876.

² South Florida R. Co. v. Weese, 32 Fla. 212, 13 So. 436.

skilled or careless fireman in the performance of his duty in temporarily handling the engine.¹

4. Statute.

Chapter 4071, Laws of 1891.

1868. SEC. 1. A railroad company shall be liable for all damages done to persons, stock or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

SEC. 2. No person shall recover damages from a railroad company for injury to himself or his property when the same is done by his consent or is caused by his own negligence. If the complainant and the company are both at fault, the former may recover, but the damages shall be increased or diminished by the jury in proportion to the amount of fault attributable to him.

SEC. 3. If any person is injured by a railroad company by the running of locomotives or cars or other machinery of such company, he being, at the time of such injury, an employee of such company, and the damage was caused by the negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding.

1869. Under chapter 3734 of the Laws of 1887, which act was repealed by the statutes of 1891, section 1 of the act of 1887 being the same as section 2 of the present act, and section 3 of the act reading, "If the person injured is himself an employee of the company, and the damage was caused by another employee of the company, and without fault on

¹ South Florida R. Co. v. Price, 32 Fla. 46, 13 So. 638.

the part of the person injured, his employment by the company shall be no bar to a recovery, and no contract which restricts such liability shall be legal or binding," it was held that this act having been borrowed from Georgia, and having received a construction there in effect that the right of an employee to recover depends upon his being entirely free from fault or negligence, such construction became a part of the law of Florida.¹

Georgia.

1. Rule.

1870. The principle of the common law in this state is that declared in *Hutchison v. Railway Co.*, 5 Exch. R. 351, to wit: "That a servant, when he engages to serve a master, undertakes as between him and his master to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both." ²

1871. It was said: "Although two persons were employed by the same master, yet, where one of them was employed as a blaster for the purpose of removing certain rocks on the master's property, and alone had charge of the work of blasting, and the other had nothing to do with it, but was employed as a wood-workman in the foundry of the master, they were not fellow-servants in the legal sense of the term, and a charge based on that assumption was erroneous, though it may have been a correct abstract statement." ³

2. Duties Personal to the Master — Vice-principals.

1872. A girl fifteen years old, who was employed in a cotton factory, was injured at night by stepping into an un-

¹Duval v. Hunt et al., 34 Fla. 85, 15 So. 876.

²Shields v. Yonge, 15 Ga. 349; Scudder v. Woodbridge, 1 Ga. 195.

³Bain v. Athens Foundry & Machine Works, 75 Ga. 719; Krogg

v. Atlanta & W. P. R. Co., 77 Ga. 214.

guarded elevator hole. The employee had, as was the custom, quit work at 3 o'clock on Sunday morning. Some of the children, including the plaintiff, awaited daylight, and were taken by their immediate overseer out of the room in the basement where they were usually kept under such circumstances, to another room, on account of the former room being damp and cold. It appeared that the orders from the superintendent were not to permit the children or others to go into any other room than the one in the basement. The girls commenced to play, and the plaintiff went into the passage-way, where she met her misfortune. It was held that the foreman or overseer who took the children to the room represented the master, and was, as to such act, a vice-principal, and it did not change the rule that his act was in violation of the orders of his superiors or master. That the agent who represents the master over other employees for the time occupies the position of master for such time as to such subordinates.¹

3. Fellow-servants.

1873. A workman engaged in the same job with two or three others, and having the direction of it, is not a general superintendent of a corporation so as to bind it as such, but stands on the footing of a mere fellow-servant.²

1874. Where an employee when injured was upon a construction train which was used for the purpose of hauling dirt, rails, etc., necessary for repairing the road-bed, and it had a crew of a number of hands constantly employed, of which such employee was one, his business being to do anything to insure the successful working of the train, it was held that he was a co-employee with the balance of the crew, including the conductor or boss of the squad, and the engineer and fireman of the engine, although at the time of the accident the train was moving from one point to another,

¹Atlanta Cotton Factory v. Speer,
69 Ga. 137.

²McDonald v. Eagle & Phoenix
Mfg. Co., 67 Ga. 761, 68 Ga. 844.

and deceased had no active duty to perform. (*Richmond & D. R. Co. v. Ayers*, 53 Ga. 12, cited, doubted and distinguished.)¹

1875. Where an action for injury to a servant was brought against a manufacturing corporation, it was held that the doctrine of fellow-servant was applicable, and that the servant could not recover for injuries caused by the negligence of another employee in the same service, even though he was a superior exercising power over the injured servant.²

1876. A corporation building a structure composed in part of brick work and in part of wood work is not responsible for the fall of the masonry upon a carpenter, whereby he was killed, where due care was exercised in selecting the mason, and there was no reason why he should not be trusted as an expert in his business, though his work proved defective and the carpenter thereby lost his life, the two workmen being employees of the common master, and co-operating in their respective departments of labor to the common end, to wit, the erection and completion of the temporary structure.³

1877. In an action for damages for injuries sustained by the negligence of defendant, the complaint alleged that plaintiff had charge of the track of defendant's tramroad, which it was his duty to repair; that it was in a fearfully bad condition; that he could not repair all the road within the time he worked, but had improved it so as to be safe; that after resuming work after a week's illness he was employed near the saw-mill and had not been over the entire track for two weeks or more; that when going out on a load of ties the train ran into a bad place in the track, throwing him from the cars and severely injuring him; that the engineer, whose duty and habit was to notify him of bad places in the track, knew of this one and that plaintiff was igno-

¹ *Prather v. Richmond & D. R. Co.*, 80 Ga. 427.

³ *Keith v. Walker Iron & Coal Co.*, 81 Ga. 49, 7 S. E. 166.

² *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227, 5 S. E. 492.

rant of it, and such engineer did not notify him thereof until just as the accident occurred, and too late for him to avoid injury. It was held that the demurrer was properly sustained, and that plaintiff knew or ought to have known of the condition of the track. It was held further that the law of this state concerning actions of this sort against railroad companies was not applicable to the case, but it was controlled by the principles of the rule of law between master and servant; and that the engineer was a fellow-servant with the plaintiff, and therefore the defendants were not liable for injuries sustained by reason of the negligence on the part of such engineer.¹

1878. A laborer engaged in loading a vessel and placed at the hatchway to give warning when bales were thrown down, and those engaged in throwing bales, are fellow-servants of a laborer employed to receive and store them below, and the latter cannot recover from the master for injuries received from being struck by a bale thrown down without warning, whether the negligence was that of the hatch-tender or of those who threw the bale down.²

1879. The manager of a vehicle, used locally by a lumber company to transport its supplies and products, and another servant of the company whose business it is to repair and keep in proper condition the track upon which the vehicle is run, and who, according to the custom of the company, was transported to and from his work on this vehicle, are fellow-servants, both being in the employment of the company, and the work of both, when regularly carried on, conducing to the accomplishment of the common object, to wit, the transportation of the company's supplies and products. The laws of this state applicable to actions by employees against railroad companies, as such, are not applicable to lumber companies, on the ground above indicated, by one of its employees, but the general law applicable to actions for personal injuries by a servant against his master must con-

¹ *White v. Kennon et al.*, 83 Ga. 343, 9 S. E. 1082.

² *Ocean Steamship Co. v. Chee-ney*, 86 Ga. 278, 12 S. E. 351.

trol. The fact that such company did on some occasions transport passengers and freight for hire did not make it a railroad company as to one of its employees who was injured by the movement of the locomotive at a time and upon an occasion when the company was in no sense engaged in transacting business as a carrier of the public.¹

4. Statute.

1880. The common-law rule was, so far as it applied to railroads, abolished in 1855 by an act of the legislature which has been incorporated into the Code.

Section 2083 of the Code of 1882 provides that "railroad companies are common carriers and liable as such. As such companies have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such company should be liable to such employees as to passengers for injuries received from the want of such care and diligence."

Section 2202 of the Code of 1882 provides: "The principal is not liable to an agent for injuries arising from the negligence or misconduct of other agents about the same business."

This was the enactment of the common law relating to corporations other than railroads and natural persons.

Section 3036 of the Code of 1882 provides: "If the person injured is himself an employee of the company, and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company should be no bar to the recovery."

1881. Under section 3033 of the Code, an employee of a railroad company would not be entitled to recover damages for an injury sustained by him, caused by the negligence of other employees of the company. Without sections 2083 and 3036 he would be under the common-law rule. Section 3033 puts the burden upon the company, in all cases

¹ *Ellington v. Beaver Dam Lumber Co.*, 93 Ga. 53, 19 S. E. 21.

where damage is done by the running of its train, to make it appear that its agents have used all ordinary and reasonable care and diligence.

Section 3036, in giving a right to employees which they did not have, says: "If the person injured is himself an employee of the company, and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

Construing these sections together, their true intent and meaning is, that whilst the company must prove that its agents have used proper care and diligence, it is necessary for the employee who sues to show that the injury was caused without fault or negligence on his part. In such a case the contest is between an employee and the company on account of alleged negligence on the part of other employees. This construction makes it incumbent on both sides to show the discharge of their duties; on the part of the plaintiff, that he was without fault or negligence to entitle him to recover; and on the part of the company, that its agents, the other employees, were not wanting in care and diligence.¹

1882. An employee cannot recover damages from a railroad company for injuries sustained by him on account of the negligence of a co-employee, unless without fault himself, even though in performing the act which resulted in the injury he was acting under the orders of a superior. The statute makes no distinction between the grades and classes of employees of a railroad company, and courts cannot recognize any.

The plaintiff was one of a section crew returning from their work, and in alighting from the hand-car while in motion slipped and fell in front of the wheels. The trial

¹ *Campbell v. Atlanta & R. A. L. & B. Co. v. Roach*, 64 Ga. 635; *R. Co.*, 53 Ga. 488; *Rowland v. Cannon*, 35 Ga. 105; *Sears v. Central R. & B. Co.*, 53 Ga. 630; *Central R. & B. Co. v. Thompson v. Central R. & B. Co.*, 54 Ga. 509.

court had charged that if the foreman had authority to employ and discharge hands (a fact conceded) for disobedience of orders, and they should find that the injury was caused by the order or direction of such foreman, then the plaintiff was not precluded from recovery, even though he was guilty of some wrong or fault himself which contributed to the injury.¹

1882a. Receivers of a railroad holding possession for a court of chancery, and operating the road under the orders of that court, are not subject to suit in their official capacity for a personal injury to one of their employees, resulting from the negligence of other of their employees in the same service. It was said: "The general rule of the common law remains in force in Georgia, that the principal is not liable to an agent for injuries arising from the negligence or misconduct of other agents about the same business. (Code, sec. 2202.) An exception prevails by statute in case of railroad employees. (Code, secs. 2083, 3033, 3036.) The plaintiff, however, is not such an employee. The road, being in the hands of a receiver, had no employees. The company was not in possession of the road. Receivers do not represent the company, but the court."²

1883. Sections 3033 and 3036 of the Code declare in unmistakable terms that any employee who is free from fault can recover for the negligence of any other employee without respect to whether the two are engaged about the same business or not. It was urged that the Code only applied to such employees as cannot possibly control those who should exercise care and diligence in the running of trains.³

1884. Before an employee can relieve himself of the legal consequences of violating any rule of the company whatever, no matter how disconnected it may appear to be with the disaster which damaged him, he must show that his vio-

¹ *Western & Atlantic R. Co. v. Adams*, 55 Ga. 279.

³ *Georgia Railroad & B. Co. v. Goldwire*, 56 Ga. 196.

² *Henderson v. Walker et al.*, 55 Ga. 481.

lation of the rule did not contribute at all to that disaster. Upon clear proof that it did not at all contribute thereto, his recovery will not be defeated by such harmless violation of the rule.

An engineer was injured by his train running into an obstruction, caused by the falling in of an embankment. At the time a visiting engineer was in the cab with him, contrary to the rules of the company. It was held that the jury were justified in finding that the presence of such engineer in no manner contributed to the happening of the disaster.¹

1885. Though one may be an employee of a railroad company, yet, if his agency is disconnected from the running of trains, and while traveling he is injured by the running of the train, he stands in the position of a passenger and will not necessarily be precluded from recovery by the existence of some degree of negligence on his part; but in such a case the doctrine of an apportionment of damages on account of contributory negligence may apply. But when the injury did not result from the running of trains and was disconnected therefrom, but resulted from the existence of a dangerous hole in the ground held by the company in connection with its depot, at which the injured party was agent, it would be necessary for him to be blameless to authorize a recovery.²

1886. Any substantial fault of an employee, however slight, which contributed to the injury for which he sues, will defeat the action. To recover he must have been blameless.³

1887. A railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, whether such injuries are con-

¹ Central R. Co. v. Mitchell, 63 Ga. 715. See East Tenn., V. & G. Ga. 173; Atlanta & Charlotte Air R. Co. v. Duggan, 51 Ga. 212.
Line v. Ray, 70 Ga. 678.

³ Kenney v. Central R. Co., 61

² Central R. Co. v. Henderson, 69 Ga. 590.

nected with the running of trains or otherwise. The only distinction made in the Code between an employee so injured and other persons so injured is that the employee must be wholly blameless to authorize a recovery; others may recover though partly at fault.¹

1888. Where a brakeman in obedience to the directions of the conductor of the train jumped therefrom while it was moving from four to six miles an hour, in order to couple cars on another track, and was injured, being thrown against the wheels in alighting upon some timbers close to the track, it was held that it was not the fault of the plaintiff in obeying this order of the conductor, and that the defendant was estopped from setting up the wrongful act of itself or its agents to excuse itself from liability to one who merely obeys an order of this sort.²

1889. Where a section-man was injured while using tools which he knew were defective, it was held that using such tools, having knowledge of their defective condition, is of itself negligence, and will not be excused to the extent of permitting a recovery of damages against the master by the fact that he undertook the dangerous duty by the immediate order of his superior, the section-boss, or from the rule that he must be without fault or negligence.³

1890. Where a workman, employed by a railroad com-road to do the work of an ordinary laborer on its track, was injured while being carried on one of the company's trains from his place of work to the camp where he staid at night, it was held that he was not within the rule declared by section 3036 of the Code, in effect, that he must be blameless to authorize a recovery, but rather that his case came within sections 2083 and 3034 of the Code, which relate to persons not employees, and provide that, if the injured

¹Thompson v. Central R. & B. Co., 54 Ga. 509; Railroad Co. v. Ivey, 73 Ga. 499; Georgia R. & B. Co. v. Brown, 86 Ga. 320; Georgia R. & B. Co. v. Miller, 90 Ga. 571.

²Central R. & B. Co. v. De Bray, 71 Ga. 406; Augusta Factory v. Barnes, 72 Ga. 227.

³Baker v. Western & Atlantic R. Co., 68 Ga. 699.

party could by the exercise of ordinary care and diligence have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the company.¹

1891. The rule of liability of a railroad company for negligence is not the same in the case of an employee as in the case of a passenger. In the case of an employee no presumption of negligence on the part of the company arises from the accident alone, as it does in the case of a passenger. But the plaintiff must at least show that the employee was using due care. The decisions which allow a partial recovery against a railway company for negligence, notwithstanding the contributory negligence of the employee or person injured, do not apply to the case of an injury sustained by an employee of the company, who must be free from fault, or he, or his representative in case of his death, cannot recover.

Where it is shown that the company itself is at fault, then the presumption is that the employee was not at fault, or, where it is shown that the employee was free from fault, then the presumption would arise that the company was at fault, and the *onus* would be on the defendant to remove that presumption by showing proper diligence. The doctrine of contributory negligence does not apply in the case of an injury sustained by an employee. He must be free from fault, and, if the injury is sustained by him in consequence of any fault or negligence on his part, he cannot recover.²

1893. That a rule of liability, not applied to other classes of employers, is thus imposed upon railroad companies, does not render this statute obnoxious to the fourteenth amendment to the constitution of the United States, as denying to such companies the equal protection of the laws.³

¹ *Atlanta & R. A. L. R. Co. v. Ayers*, 53 Ga. 12.

³ *Georgia R. & B. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939.

² *East Tenn., V. & G. P. R. Co. v. Maloy*, 77 Ga. 237, 2 S. E. 941.

1894. In an action against the defendant railroad company for injuries to an employee, caused by the negligence of a co-employee, the court instructed that, "to make a *prima facie* case, the plaintiff must prove either that he was not to blame or that the company was. The company, in replying, may defend successfully by disproving either proposition, that is, by showing either that the plaintiff was to blame or that the company was not. By blame I mean the want of due diligence." The measure of diligence which the law imposes upon railroad companies in reference to employees, and in the conduct of employees in reference to their company, is ordinary diligence or common prudence. It was held there was no error in the instruction.¹

1895. An employee of a railroad company may recover damages sustained by reason of injuries inflicted in consequence of the negligence of a fellow-servant in and about a common employment, if himself free from fault, notwithstanding their engagement in a business not immediately connected with running and operating the company's trains. In such a case, the negligence of the plaintiff, however slight, contributes in an appreciable degree to the cause of the injury, and defeats a recovery. No presumption of negligence against the company arises until he shows affirmatively that he was himself without fault, or in such a case plaintiff shows that the injury was inflicted through the negligence of a fellow-servant engaged in and about a common employment, and without fault upon the part of the former. The burden is cast upon the company of showing only that its servants exercised ordinary and reasonable care, and an instruction to the jury which imposes upon the defendant the superadded duty of showing how the casualty occurred is erroneous.²

¹ Central R. Co. v. Lanier, 83 Ga. 587, 10 S. E. 279.

² Georgia R. & B. Co. v. Hicks, 95 Ga. 301, 22 S. E. 613.

Idaho.

1. Duties Personal to the Master — Vice-principals.

1896. A carpenter riding on one of the trains of the defendant company and in its employ was injured through the derailment of the train, caused by a defective track. It was alleged that the station agent knew of the defect, and that his duty required him to notify the proper officers of the company, and also the trainmen, which he failed to do. The question was whether he was under the circumstances a fellow-servant or vice-principal. It was held that he was a representative of the master; that the deceased carpenter was employed in a distinct department of the business, and, within the doctrine of the *Ross Case*, was not a fellow-servant of the agent.¹

2. Fellow-servants.

1897. Where a miner, while ascending the ladder in a mine, was injured by being struck with a drill being lowered down the shaft by the blacksmith, it was held that he could not recover; that they were fellow-servants.²

Illinois.

1. Rule.

1898. Where an employee is hurt in an employment wholly separate and disconnected from that of the servant who causes the injury, a recovery may be had, where there is negligence, the same as in other cases. A clerk in a depot, a carpenter employed in constructing or repairing cars in a shop, or other persons disconnected with the management of the trains and its officers, may recover where, by carelessness of those running a train, he is injured. The rule only applies that a fellow-servant cannot recover for the injury occasioned by a fellow-servant where they are engaged in

¹Palmer et al. v. Utah & N. R. Co., 2 Idaho, 290, 13 Pac. 425.

²Snyder v. Viola Mining & S. Co., 2 Idaho, 771, 26 Pac. 127.

the same department of business. The object of this rule is to make each servant vigilant in seeing that the others are careful, prudent and faithful in the discharge of their duties; and if not, that it shall be to their interest to report all derelictions that occur.¹

1899. Those who are engaged in the service of the same master, in carrying on and conducting the same business in which the usual instrumentalities are employed, may justly be called fellow-servants. A proper test of this relation is whether the negligence of one is likely to inflict injury on the other. This was said with reference to a car-repairer, injured upon the track by the act of an engine-driver mistaking the signal of the yard-master.²

1900. In order to constitute servants of the same master "fellow-servants," within the rule *respondeat superior*, it is not enough that they were doing parts of the same work or in the promotion of some enterprise carried on by the master not requiring co-operation, nor bringing the servants together or into such personal relation that they could have exercised an influence one upon the other, promotive of proper caution in respect to their mutual safety, but it is essential either that they were actually co-operating at the time of the injury in the particular business in hand, or that their duties should bring them into habitual consociation, so that such proper caution would be likely to result.

The language used in defining what shall constitute fellow-servants in *Chicago & Alton R. Co. v. Murphy*, 53 Ill. 336, and *Valtez v. Ohio & Miss. R. Co.*, 85 Ill. 500, regarded as laying down the rule too broadly, and disapproved.

The facts upon which the decision is based were, that the plaintiff was foreman of a section-gang and was injured by the careless act of a fireman upon a passing engine in throwing a large lump of coal from the tender attached to the engine. All cases are reviewed in the opinion.³

¹ *Pittsburg, F. W. & C. R. Co. v. Powers*, 74 Ill. 341. ³ *C. & N. W. R. Co. v. Moranda*, 93 Ill. 302.

² *Valtez v. O. & M. R. Co.*, 85 Ill. 500.

1901. The statement of the rule in the foregoing case repeated, yet it is said it was not intended to be decided, as a matter of law, that a section foreman of a gang of track repairers, and the engineer and fireman of an engine drawing a train, all employees of the defendant, were not directly co-operating with each other in their respective labors, and that their usual duties did not bring them into habitual consociation, so that they might exercise influence upon each other promotive of proper care, but this was merely assumed as a hypothesis for the purpose of evolving from previous decisions the proper rule of law. That it could not be asserted as a universal truth. It became a question for the jury.¹

1902. Persons may be fellow-servants although not strictly in the same line of employment. One person may be employed to transact one department of business, and another may be employed by the same master to transact a different and distinct branch of business, but if their usual duties bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, such persons might be regarded as fellow-servants.²

1903. Whether a servant of a railroad company killed by a construction train was a fellow-servant of those in charge of the train at the time of the accident was held to be a question of fact and not one of law for the court, and the finding of the appellate court as to such fact is conclusive. So in an action against a railway company to recover damages for the killing of plaintiff's intestate, while engaged as a laborer in loading iron upon a car on a side-track, by a construction train, the defendant asked the court to instruct the jury that under the facts detailed in the evidence, showing the relation of the train crew and the deceased, and their associations with him at the time of the injury, the deceased and such crew were fellow-servants, and being such

¹ C. & N. W. R. Co. v. Moranda, Ill. 64; Joliet Steel Co. v. Shields, 108 Ill. 576.

146 Ill. 603, 34 N. E. 1108.

² Rolling Mill Co. v. Johnson, 113

the jury should find for the defendant, which was refused. It was held properly refused, as, if given, the instruction would have invaded the province of the jury, it being a question of fact whether the crew of the train and the deceased were fellow-servants.¹

1904. In an action by a servant against his master for personal injuries, a declaration which charges that the plaintiff was injured by the negligence of defendant's servants, without alleging that they were not plaintiff's fellow-servants, is not sufficient to support a verdict.²

1904a. Where the master leaves it to another to perform his duty in respect to furnishing a safe place for work, he is responsible for the manner in which that duty is performed, without regard to his personal knowledge or notice of dangerous conditions.³

2. Vice-principals.

1905. One servant of a corporation to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may ordinarily be required to do, is, as to such servants whom he so hires, discharges and controls, the representative of the master when exercising such power or control, and not a fellow-servant, nor is he in the same line of employment as the servant he so controls.

The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances.

If the negligence consists of some act done or omitted by

¹ Chicago & Alton R. Co. v. Kelly, 127 Ill. 637.

² Joliet Steel Co. v. Shields, 134 Ill. 209, 25 N. E. 569.

³ Hess v. Rosenthal, 160 Ill. 621.

the servant having such authority, which relates to his duty as a co-laborer with those under his control, and which might as readily happen with one of those having no such authority, the common master will not be liable. But where the negligent act arises out of, and is the direct result of, the exercise of authority conferred upon him by the master over his co-laborers, the master will be liable. In such case the governing servant is not the fellow-servant of those under his charge with respect to the exercise of such powers.

Where a corporation confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of the business, such employee, in governing and directing the movements of the men under his charge, is the direct representative of the corporation itself, and all commands given by him within the scope of his authority are in law the commands of the corporation; and the fact that he may have an immediate superior between him and the company makes no difference in this respect.

This rule applied where a laborer in a lumber-yard was injured in consequence of the giving of a negligent order by the foreman of the yard.¹

1906. An assistant superintendent is the representative of the company and not a fellow-servant of a conductor injured in consequence of obedience to his order, negligently given.²

1907. The negligence of a foreman, consisting of his knowledge that an iron girder was loose in a building in process of construction, is attributed to the master.³

1908. The "pit boss" of a mine, who has authority to direct the men to do certain work or quit, is a vice-principal.⁴

1909. An instruction in relation to the negligent piling of pork barrels, to the effect that if the person who ordered the

¹ Chicago & Alton R. Co. v. May, 108 Ill. 288.

² C., B. & Q. R. Co. v. McLallen, Adm'r, 84 Ill. 109.

³ Wight Fire Proofing Co. v. Poczekai, 130 Ill. 139, 22 N. E. 543.

⁴ Consolidated Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627.

work done was in the employ of the defendant, and authorized to have charge of the employees, of whom plaintiff was one, in doing such work, and to direct them in the matter, then while acting within the scope of such authority he was a direct representative of the master, a vice-principal, was held to be correct.¹

1910. A superintendent of a mine who has entire charge of the work and the men is a vice-principal.²

1911. Where an employee was injured, as was alleged, by reason of a defective car-coupling upon a foreign car, upon the question of the neglect of duty on the part of those persons whose duty it was to attend to such matters it was said: The negligence of fellow-servants is one of the ordinary perils of the service, which one takes the hazard of in entering into any employment. But the master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes, and where the performance of that duty is devolved upon a fellow-servant the master's liability in respect thereto still remains. Care in the supplying of safe instrumentalities in the doing of the work undertaken is the duty of the master to the servant. Hence, the rule of non-liability on the part of the employer for the negligence of a fellow-servant has no application in this case, where the negligence in question is the master's neglect of duty in providing safe appliances.³

3. Fellow-servants.

1912. Brakemen upon a train are fellow-servants, where one who is attending a switch negligently gives a signal to the engineer too soon, whereby his fellow-brakeman is injured.⁴

¹ Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N. E. 801.

³ C., B. & Q. R. Co. v. Avery, 109 Ill. 314.

² Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572.

⁴ Chicago & Alton R. Co. v. Rush, 84 Ill. 570.

1913. The doctrine of consociation, as stated in *Railway Co. v. Moranda*, 93 Ill. 302, approved and applied; and it was held that where it was the duty of one employee to watch and report the conduct of a foreman of a crew in making up trains, and his duty could only be performed by constantly watching the engine and cars operated by such crew, that this constituted such consociation within the rule as to make the foreman of such crew and the night-watcher fellow-servants, where the latter was injured by the negligent manner in which the former performed his duties.¹

1914. Where a head blacksmith, who, while proceeding with a number of other employees upon a train to remove a wreck, was injured by the negligence of the engineer, who also acted as conductor, it was held that all such employees were fellow-servants.²

1915. An engineer upon a switch-engine and a helper or switchman working with him are fellow-servants, where the latter is injured.³

1916. Where a conductor of a train was killed by a collision of two trains at the intersection of two railroads, in consequence of the negligence of the station agent in giving signals when the several trains might pass with safety, no recovery can be had by his personal representative if his co-employees in charge of the train under him were guilty of negligence which contributed to his death. Their negligence is imputed to him.⁴

1917. An engineer employed by a mining company to operate an engine used in letting down a cage to the bottom of the shaft, and a track-layer in the bottom of the mine, are fellow-servants.⁵

1918. A laborer upon a construction train is a fellow-servant with the conductor and engineer.⁶

¹ Chicago & East. Ill. R. Co. v. Geary, 110 Ill. 383.

⁴ C. & N. W. R. Co. v. Snyder, 117 Ill. 376.

² Abend v. T. H. & I. R. Co., 111 Ill. 202.

⁵ Niantic Coal & Mining Co. v. Leonard, 126 Ill. 216.

³ Stafford v. C., B. & Q. R. Co., 114 Ill. 244.

⁶ Miller v. Railway Co., 24 Ill. App. 326.

1919. A foreman, while performing the duty of a servant, is a fellow-servant with employees under him.¹

1920. Locomotive engineers on the same road are fellow-servants with each other.²

1921. Two switching crews engaged in the same railroad yard, the one in delivering cars and the other in receiving them, are fellow-servants.³

1922. A hostler and a helper in the employ of a railroad company, each performing duties in the care of engines at a round-house, are fellow-servants.⁴

4. Not Fellow-servants.

1923. A servant employed upon the track, and an engineer operating an engine, are engaged in different departments of the service, and are not fellow-servants, where the former is injured by negligence of the latter.⁵

1924. Those whose duties relate to the furnishing of appliances for the use of operatives are engaged in a different department of the service from such operatives, and are not fellow-servants. Thus, where an engineer was killed by the explosion of a boiler, caused by the negligence of those whose duty it was to build and repair the same, the master was held liable.⁶

1925. An employee in one department of defendant's business, while engaged in unloading brick from a car on one of defendant's tracks, was injured by other cars being pushed against the car upon which he was engaged, and without notice to him. This was held to be the negligence of the defendant; that its duty was to bring no peril upon him

¹ Fitzgerald v. Honkomp, 44 Ill. App. 365.

² Ohio & Miss. R. Co. v. Robb, 36 Ill. App. 627.

³ O'Leary v. Wabash R. Co., 52 Ill. App. 641.

⁴ Chicago & W. I. R. Co. v. Masig, 50 Ill. App. 666.

⁵ Pittsburg, F. W. & C. R. Co. v. Powers, 74 Ill. 341; Toledo, W. & W. R. Co. v. O'Conner, 77 Ill. 391.

The authorities reviewed and general rule stated. Ft. W. & W. R. Co. v. Durkin, 76 Ill. 395.

⁶ Toledo, W. & W. R. Co. v. Moore, Adm'x, 77 Ill. 217.

without first giving him timely notice. The court again state the rule or test of fellow-servants,—that is, they should be in the same line of employment, or their usual duties shall bring them into *habitual* association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is that the relation between the servants must be such that each as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against the consequences. And of course where there is no right or opportunity of supervision, or where there is no independent will, and no right or opportunity to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application.¹

1926. Where two railroad companies use the same track, and each controls its own trains, the servants of the two companies are not fellow-servants.²

1927. The fact that a section foreman, who is injured by a train running upon him contrary to signal, was the one who ordered the signal to be given, does not tend to show that he was co-operating with those in charge of the train so as to render them his fellow-servants.³

1928. Employees whose duties relate to the care and deposit of certain molds or appliances, and those who are engaged in repairing other appliances used in the business, are not fellow-servants.⁴

1929. It was the duty of a car-inspector to inspect freight-cars on their arrival at the yards of the company. As soon as a train arrived the superintendent of that department directed the inspector to go upon the cars and begin the work of inspection, which he did on this occasion as soon as the train came to a full stop, and when about to step from one car to another the engineer without warning suddenly

¹ Rolling Mill Co. v. Johnson, 113 Ill. 57.

² Chicago & E. I. R. Co. v. O'Conner, 119 Ill. 586, 9 N. E. 263.

³ Peoria, D. & E. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951.

⁴ Joliet Steel Co. v. Shields, 145 Ill. 603, 34 N. E. 1108.

started the engine with such unusual force that the train parted, and the inspector fell upon the track and was injured. The proof showed that when the freight train came to a certain place, as it did on a particular occasion, the engineer's duty in respect to the train ceased, and it was his duty to take his locomotive to the engine-house, and after the inspection the train would be broken up by a switch-engine and set apart.

It was held that the engineer and inspector were not fellow-servants engaged in the same employment.

It was said: "In the very nature of the business each was engaged in, it was impracticable for one to have any influence over the other promotive of proper caution or otherwise. They were strangers to each other, and might have remained so for an indefinite time so far as anything in their business relations would have brought them together. It is true they might have been fellow-servants in the strictest sense, and yet might not have been associated an hour before the happening of the injury. What is meant is, if the parties continue to be engaged in a common service, they will be habitually associated, so that they may exercise an influence over each other promotive of common safety. That never could have occurred in this case, for the obvious reason that the duties of the engine-driver ceased at or before plaintiff's would begin, so that it would be impossible for one to exercise any influence over the other."¹

1930. Men employed by a steel manufacturing company to keep in repair the railroad tracks in the mill, who do their work while the workmen who make steel in the mill are away, are not the fellow-servants of such workmen. The duties of the two sets of men never brought them together in the discharge of their respective duties. Their duties were as disconnected as if they were employed by different masters and performed their labors in shops having no connection whatever with each other.²

¹ Chicago & Alton R. Co. v. Hoyt,
122 Ill. 369.

² Joliet Steel Co. v. Shields, 146
Ill. 603, 34 N. E. 1108.

1931. Where an employee, working under the direction of a section-boss in unloading iron rails from a car upon a side-track, was injured by a car of a construction train being negligently thrown against the car upon which he was at work, it was held that he was not a fellow-servant of the men operating the train. It was said: "He had no connection whatever with the construction train or those who had charge of that train. The construction train was under the control of a conductor to whom he owed no duty of any character. What co-operation was there at the time of the injury between him, the conductor and the engineer? None whatever. Under the facts shown we think it plain that he was not a fellow-servant with those in charge of the construction train."

The rule as stated in *Railway Co. v. Moranda*, 108 Ill. 580, was restated and applied.¹

1932. A railroad laborer employed to unload rails from cars is not a fellow-servant of the engineer on the locomotive attached to the train, where the defect or cause of the injury was the failure of such engineer to report to the master mechanic the defective condition of the engine.²

1933. A servant employed to keep and put machinery in proper order is not the fellow-servant of one whose duty it is to use it.³

1934. Where the foreman of a section gang failed to warn the men under him of approaching trains, he was not, as to such duty, their fellow-servant.⁴

1935. A contractor engaged in changing the gauge of a railroad is a servant of the company, and the company is chargeable with his negligence in causing an injury to one of his employees.⁵

¹ *Chicago & Alton R. Co. v. Kelly*, 127 Ill. 637.

⁴ *C., St. L. & P. R. Co. v. Gross*, 133 Ill. 37.

² *Peoria, etc. R. Co. v. Johns*, 43 Ill. App. 83.

⁵ *Toledo, etc. R. Co. v. Conroy*, 39 Ill. App. 351.

³ *Tudor Iron Works v. Weber*, 129 Ill. 535.

Indiana.

1. Rule.

1936. The doctrine that a principal is not liable to one of his servants for injuries sustained through the negligence of another servant when both are engaged in the same business was first declared in Indiana in 1855. It was stated that the rule was based upon grounds of public policy; that the safety and welfare of the public demands the establishment of the non-liability principle on the part of the employer in such cases. When established it can work no injury to the servant, because his entering upon the service is voluntary, and is with a knowledge of its hazards and with a power and right to demand such wages as he shall deem compensatory.¹

1937. A brakeman on a train and one whose duty and business it was to attend to a switch were held to be engaged in the same general undertaking and therefore were fellow-servants.²

1938. Servants engaged in the same general line of duty are fellow-servants, although one may be a superior and the other may be a subordinate servant under his immediate direction and control.

The master is bound to use care, skill and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to the servant injured by the omission. This duty on the part of the master is one which he cannot rid himself of by casting it upon an agent, officer or servant employed by him. Where the duty is one owing by the master and he intrusts its performance to an agent, the agent's negligence is that of the master. In authorizing an agent to perform such an act, the principal is in legal contemplation himself acting when the agent acts, for he who acts by an agent acts by himself. The rule which absolves the master from liability

¹Madison & Indianapolis R. Co. v. Bacon, 6 Ind. 205.

²Slattery's Adm'r v. Toledo & Wabash R. Co., 23 Ind. 81.

for the negligence of the fellow-servant has no application whatever where the agent stands in the master's place.

Where a non-resident corporation intrusts to a superior resident officer or agent the duty of superintending the machinery of its factory and of managing its business, it is responsible to a servant who suffers an injury from unsafe or defective machinery upon which the servant is employed under the control and direction of such officer or agent.¹

1939. It is settled that the fact that the one employed is the superior of the other makes no difference, for the question is not one of rank; the question is, are they fellow-servants? If they are, there can be no recovery against the master for injuries caused by the negligence of the co-employee. If the superior is acting in the capacity of a co-employee at the time his negligence causes the injury, no action can be maintained though he had the right to retain or discharge the inferior servant. An agent of high rank may be at the time the acts are done the fellow-servant of the under-employee occupying the subordinate position. If, for instance, the general superintendent should take hold of one end of an iron rail and assist an employee of the company in loading it onto a car, he would be as to that specific act a fellow-employee, although as to other acts he might be the representative of the master. Where, however, the agent whose negligence caused the injury is at the time in the master's place, then he is not a co-employee, but the representative of the employer. By whatever name the position which the agent occupies may be called, he is the representative of the master if his duties are those of the master; but if his duties are not those of the master, then he is no more than a fellow-employee with those engaged in the common service, no matter what may be his normal rank.

While the foregoing rule was stated, yet where the master mechanic in a railroad company's shops, who had full authority over the men, machinery and work, and was the only representative of the company there at the time, ordered a

¹ Indiana Car Co. v. Parker, 100 Ind. 181.

workman to disconnect the equalizer of one of the locomotives, and while the workman was so engaged, under the direction of such master mechanic, the latter negligently moved the equalizer so that it fell upon and injured the workman, it was held that he was not a fellow-servant. The precise ground upon which this exception is made appears to be that in giving the direction he represented the master, and in giving the order he had no right to increase the peril by his own negligence.¹

1939a. In constructing a bridge, thick plank were used as a track for moving heavy timbers. The thin edges were wedged, which method was the customary one. One of the wedges worked out (which was not unusual) while workmen were engaged in moving timbers, causing the plank to tip and fall, knocking one of such workmen off the bridge. It was held that the duty of keeping the wedges in place did not devolve upon the master, but was the work of servants. That the foreman as to such duty was not a vice-principal.²

1940. A servant suing for injuries need not allege that the injuries were not caused by the negligence of a fellow-servant.³

1941. A servant cannot recover for an injury caused by the negligence of a fellow-servant in the same line of employment, although of a superior grade, unless the latter occupies the place of a vice-principal. And this rule applies to minors as well as adults. Mere superiority in rank is not sufficient to constitute a servant a vice-principal. In order to be considered such, he must have authority in the premises.⁴

1942. Where the master negligently provides defective appliances for doing the work and personally supervises the same, he is liable in damages to servants who, without fault and without knowledge of such defect, are injured thereby.

¹ Taylor v. Evansville & T. H. R. Co., 121 Ind. 124, 22 N. E. 876.

³ Louisville, E. & St. L. C. R. Co. v. Miller, 140 Ind. 685, 40 N. E. 116.

² Bedford Belt R. Co. v. Brown, 142 Ind. 659.

⁴ Pittsburg, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187.

If an employer directs that certain work be done, leaving it to the workmen to provide the structures and appliances required for its prosecution, his responsibility to those employees ends with the selection of suitable men and materials for the work.

This was said where the defendant erected a framework or anchorage in a building to be used in the removal of a large safe down the stairs.¹

1943. Loading railroad iron on flat-cars is the work of the servants, and when it is averred that a servant was injured by the manner in which the loading was done, it will be presumed that the injury was done by the negligence of a fellow-servant.²

1944. Where a servant has knowledge of the negligent habits of a fellow-servant, and enters the employment of the common master with such knowledge, or continues therein after he has acquired such knowledge, he cannot recover against the master for injuries resulting from the negligence of such fellow-servant. And if the complaint in such an action fails to negative the existence of knowledge, it will be bad on demurrer, though it alleges the master had knowledge of such negligent habits.³

1945. Where the master delegates duties which the law imposes upon him to an agent, the latter, whatever may be his rank, in performing such duties acts as the master, and if a servant of the common master is injured by the negligence of the agent in performing such duties, the master is liable for the negligence of the foreman or other like agent. The master is not liable to a fellow-servant engaged in the same general service, except where the duties of the master have been delegated to a foreman.⁴

¹ *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. 302.

² *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200.

³ *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630.

⁴ *Capper v. Louisville, E. & St. L. R. Co.*, 103 Ind. 305, 2 N. E. 749; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Atlas Engine Works v. Randall*, 100 Ind. 293.

1946. One line of distinction between vice-principals and co-employees is in the duty in one instance to supply or maintain instrumentalities of the service, and in the other to use the instrumentalities supplied. Negligence in the first, though that of a servant, is the master's negligence, while in the second the negligence is that of a fellow-servant.

This distinction keeps in view the proposition that where the master himself participates in the use, and the negligence is his own, he may not be said to be a fellow-servant.

It was held that one employed by another to inspect cars furnished by a railroad company, and to shift them to a point where they could be loaded, was a fellow-servant of one employed to load them, and the defendant was not liable for injuries to the latter, caused by defects in the cars, which the former negligently failed to discover and guard against. (*Railway Co. v. Miller*, 117 Ind. 439, followed.)¹

2. Duties Personal to the Master — Vice-principals.

1947. An employer or master is not liable, in the absence of an express contract to that effect, for injuries suffered by one of his employees through the carelessness of another employee of the same master engaged in the same general business. Nor is the master rendered liable by the fact that the employee receiving the injury is inferior in grade of employment to the one by whose negligence the injury is caused, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end.

It is the duty of a railroad corporation to use every reasonable care in the proper construction of its road, in supplying it with the necessary equipments, including properly constructed engines and the necessary and proper materials for its repair, and in the selection of competent, skilful and trusty subordinates to supervise, inspect, repair and regu-

¹ *Neutz v. Jackson Hill Coal & Coke Co.*, 139 Ind. 411, 38 N. E. 324.

late the machinery, and to regulate and control the operation of the road. If these duties are performed with care, skill and diligence by the directors, and one of the persons so employed is guilty of negligence by which an injury occurs to another employee, it is not the negligence of the directors or master and the company is not responsible.

The principle of *respondet superior* does not apply as between a railroad company and its employees, and the company cannot be held responsible to the employee injured without his fault while in the discharge of his duty, where the injury is caused by the negligence or failure of the board of directors to perform some duty devolved upon them by express contract with an employee or which is implied from their relation of master to the employee.

A master machinist who has the immediate charge, control and direction of the engines and other machinery of a railroad company and the repairs thereof and the control and direction of the engineers and firemen on the trains is a fellow-servant of such a fireman. (*Fitzpatrick v. Railway Co.*, 7 Ind. 436, disapproved.)¹

1948. If the master be not present, and conducts a business by a superintendent, who employs and discharges the laborers and employees, such superintendent is not a fellow-servant, but represents the master. The owner of mills and machinery which men are employed to operate owes duties to the employees which he cannot escape by absenting himself and committing the entire charge to the agent. Such agent, in respect to furnishing safe machinery, represents the master.²

1949. If the master subjects the servant to the command of another, without information or caution with respect to such obligations as the master owes, that is, without instruction or warning as to or of dangers, where such are needed, and such superior servant, though a fellow-servant within the rule, in directing the inferior fails to give him notice

¹ *Columbus & I. C. R. Co. v. Arnold*, Adm'r, 31 Ind. 174.

² *Mitchell et al. v. Robinson*, 80 Ind. 281.

or proper caution, then his omission is chargeable to the master, upon the ground that it is one of the duties of the master not to expose an inexperienced servant, at whose hands he requires a dangerous service, to such danger without giving him warning. He must also give him such instruction as will enable him to avoid injury, unless both the danger and means of avoiding it are apparent. These are obligations of the master, and he cannot exempt himself from liability by delegating his power to command the servant to another, upon whom the obligation to instruct and caution is also imposed.¹

1950. A foreman employed by a railroad company, having exclusive charge and control of laborers working under him, with full authority to direct where they shall work, is not the fellow-servant of the laborers, and the railroad company will be liable for his negligence in ordering them to work in a dangerous place. This ruling was based upon the ground that, it being the master's duty to provide a safe place for his servants to work, the agent to whom it is intrusted acts as the master.

The facts were that a foreman ordered an employee to work in a tunnel which such foreman knew to be dangerous and defective.²

1951. Where a foreman of a railroad company, having exclusive control over a gang of men employed by the company, with full power to direct their movements, orders an employee to work at a certain place, and while he is there negligently directs another to start a locomotive whereby the employee is killed, he cannot be considered a fellow-servant so as to relieve the company from liability. (*Taylor v. Railway Co.*, 121 Ind. 124, followed.)³

1952. A carpenter in a railway company's repair shops in placing a handle on a hand-car acts as the company's

¹ *Atlas Engine Works v. Randall*, 100 Ind. 293.

³ *Nall v. Louisville, N. A. & C. R. Co.*, 129 Ind. 260, 28 N. E. 183.

² *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668.

vice-principal as regards section-hands using the car, so as to impute his negligence of defects in the wood used for the handles to the company, and the company is liable for injuries to a section-hand caused by such defects. The fact that the lumber used for the handles was inspected before it was sent to the shops for use does not relieve the company from liability.¹

1953. A foreman of a railroad company's machine shop who neglects to repair a defect in an engine of which he has notice is not, as respects the duty to repair such defect, the fellow-servant of a brakeman who is injured because of such defect.²

1954. The duty of the master to provide a safe working place and safe machinery for his employees cannot be delegated so as to absolve the master from liability; and where a servant is charged with the duty of providing safe machinery, he acts as the master in performing the duty, and is not to be regarded as a mere fellow-servant with one engaged in the service of the common master.

This rule was stated where a fireman was injured, caused by the parting of the engine from its tender owing to the uneven height of the attachments.³

1955. Where the duty to furnish reasonably safe and proper instrumentalities for the performance of the work required rests upon the employer, the conclusion logically follows that the consequences of a negligent failure to perform that duty must, no matter to whom it may have been committed, be visited upon the employer, and not upon the employee who suffered the injury therefrom. It cannot be said that a car-inspector in the employment of a railroad company upon whom is enjoined the duty of inspecting the company's cars is a co-employee of a brakeman or of one who is in the line of his service discharging the duties of a

¹ Illinois, I. & I. R. Co. v. Snyder (Ind.), 39 N. E. 912.

² Ohio & M. R. Co. v. Stein, 140 Ind. 61, 39 N. E. 246.

³ Krueger v. Louisville, N. A. & C. R. Co., 111 Ind. 51, 11 N. E. 957; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380.

brakeman, within the meaning of the common-law rule, which exempts a master from liability for injuries to a servant resulting from the negligence of a fellow-servant.¹

1956. Where the foreman acted as the vice-principal in calling out all employees to avert the threatened destruction of a bridge by the accumulation of drift in a freshet, he did not cease to be such vice-principal and become a fellow-servant as soon as he had assigned to the other employees the place to work, but retained his original character while directing the details of the work.²

1957. Where a car-repairer was injured while repairing cars on a track, and the court charged that if the foreman ordered such employee to repair the car on the track where it stood, in the absence of any rules on the subject, signals, or providing directions to the employees on the subject, if the place could have been made safe by placing a flag at the switch, failure of the foreman to do so was the failure of the company; but if the employee at the time knew that it was his duty, and that one of the rules required that if he went under the car he must himself place a signal flag at the switch, and by neglecting to do so, and by reason of his neglect, he was injured, the company was not liable. It was held that the court clearly stated the law.³

3. Fellow-servants.

1958. Employees upon a gravel train who were injured by the negligence of the engineer were denied recovery of damages from the master for such injuries on the ground that the engineer and employees were engaged in the same general undertaking and were therefore fellow-servants.⁴

¹Cincinnati, H. & D. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287. See, also, Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453; Ohio & M. R. Co. v. Percy, 128 Ind. 197, 27 N. E. 497. ²Nall v. Louisville, N. A. & C. R. Co., 129 Ind. 260, 28 N. E. 611. ³Louisville, E. & St. L. R. Co. v. Hanning, 131 Ind. 528, 31 N. E. 187. ⁴Ohio & Mississippi R. Co. v. Tindall, 13 Ind. 366.

1959. An employee whose duties are various, consisting among other things of coupling and uncoupling trains, was held, while engaged in uncoupling cars, to be engaged in the same general undertaking as the engineer and conductor having charge of the cars, and therefore they were his fellow-servants.¹

1960. A brakeman on a train, and one whose duty and business it was to attend to a switch, were held to be engaged in the same general undertaking and therefore were fellow-servants.²

1961. A servant of a railroad company employed in repairing the track thereof, and one employed in running trains thereon, are engaged in the same general undertaking, and where the former was injured by the negligence of the latter the company is not liable.³

1962. It was held that injury to a brakeman upon one train by reason of a collision with another train, caused by the negligence of the train-dispatcher, whose duties were to control the movements of trains, afforded no right of action against the railroad company for the injury. The brakeman and dispatcher, though many miles apart and with distinct duties, were nevertheless co-servants in the accomplishment of the same general object.⁴

1963. It was held upon demurrer, where the allegation was that the plaintiff was injured while employed under the direction of the superintendent and manager in charge of the machinery in defendant's factory, through the negligence of such superintendent, that he was a fellow-servant of the plaintiff.⁵

1964. The rule that the mere fact of superiority or difference in rank or grade of co-employees does not affect the question of their being fellow-servants was applied where

¹ *Wilson v. Madison, etc. R. Co.*, 18 Ind. 226.

⁴ *Robertson v. Terre Haute & I. R. Co.*, 78 Ind. 77.

² *Slattery's Adm'r v. Toledo & Wabash R. Co.*, 23 Ind. 81.

⁵ *Boyce v. Fitzpatrick*, 80 Ind. 526.

³ *Gormley's Adm'r v. Ohio & Mississippi R. Co.*, 72 Ind. 31.

a young man, under the direction of the mining boss who had charge of a coal mine, was injured through the alleged negligence of such boss.¹

1965. Where plaintiff was employed by defendant to clean engines, and, being inexperienced, was placed under the charge of certain other employees until he should learn the business; and he was injured while cleaning under an engine by reason of the engineer starting the engine, it was said: "If there was negligence on the part of the employees of the company either in ordering him to clean the engine or of the engineer in starting it, it was the negligence of a co-employee, for which the company was not responsible."²

1970. Stone masons engaged in the construction of a bridge are fellow-servants with carpenters at work on the same bridge.³

1971. The other members of a train crew, engaged with a brakeman in making a running switch, under orders from their conductor, simply to side-track certain cars, are his fellow-servants.⁴

1972. While a section foreman of a railway company, who had full power to employ and discharge track hands who worked under him, was taking his gang, at the close of the day, on a hand-car to the tool-house, one of his men was injured through his negligence in not properly applying the brake. It was held that, while the foreman was the vice-principal in the matter of hiring and discharging hands, he was merely a fellow-servant in transporting his men to and from their work, and the defendant was not liable.⁵

1973. A laborer employed on a construction train and the engineer of such train are fellow-servants.⁶

¹ *Brazil & Chicago Coal Co. v. Cain*, 98 Ind. 282.

² *Spencer v. Ohio & M. R. Co.*, 130 Ind. 181, 29 N. E. 915.

³ *Bier v. Jeffersonville, M. & I. R. Co. et al.*, 132 Ind. 78, 31 N. E. 471.

⁴ *Sheets v. Chicago & I. Coal & R. Co.*, 139 Ind. 682, 39 N. E. 154.

⁵ *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303.

⁶ *Evansville, etc. R. Co. v. Mad-dux*, 134 Ind. 571, 33 N. E. 345.

1974. A servant of a railroad company, engaged in constructing and repairing defects in the line of its road, is the fellow-servant of an engineer in charge of a train which conveys him to and from his work, where such servant is injured through the negligence of such engineer.¹

4. Statute.

1975. An act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state.

SEC. 1. Be it enacted by the general assembly of the state of Indiana, that every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

First. Where such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, place or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employee at the time of his injury was bound to conform and did conform.

Third. Where such injury resulted from the act or omission of any person, done or made in obedience to any rule,

¹ Capper v. Louisville, E. & St. Co., 23 Ind. 81; Thayer v. St. Louis, L. R. Co., 103 Ind. 305, 2 N. E. 749; etc. R. Co., 22 Ind. 26; Ohio & M. Ohio & M. R. Co. v. Tindall, 13 Ind. R. Co. v. Hammersley, 28 Ind. 371; 366; Wilson v. Madison, etc. Co., 18 Gormley v. Ohio & M. R. Co., 72 Ind. 226; Slattery v. Toledo, etc. R. Ind. 31.

regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shops, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employee or fellow-servant engaged in the same common service, in any of the several departments of the service of any such corporation, the said person, co-employee or fellow-servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein contained shall be construed to abridge the liability of the corporation under existing laws.

SEC. 2. Neither an employee, nor his legal representative, shall be entitled under this act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to an order which subjects the employee to palpable danger, nor where the injury was caused by the incompetency of the co-employee, and such incompetency was known to the employee injured; or such injured employee, in the exercise of reasonable care, might have discovered such incompetency, unless the employee so injured gave, or caused to be given, information thereof to the corporation or some superior intrusted with the general superintendence of such co-employee, and such corporation failed or refused to discharge such incompetent employee within a reasonable time, to investigate the alleged incompetency of the co-employee or superior, and discharge him if found incompetent.

SEC. 3. The damages recoverable under this act shall be commensurate with the injury sustained unless death results from such injury, when in such case the action shall survive and be governed in all respects by the law now in force in

respect to such actions. Provided, that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal and pending such appeal the injured person dies, and the judgment in the court below is thereafter reversed, the right of action of such person shall survive to his legal representatives.

SEC. 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

SEC. 5. All contracts made by a railroad or other corporation with their employees, or rules or regulations adopted by any corporation, releasing it or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

SEC. 6. An emergency exists for the immediate taking effect of this act, and the same shall be in force from and after its passage and publication.

1976. The statute which provides "That every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence in the following cases: . . .

"*Third.* Where such injury resulted from the act or omission of any person, done or made in obedience to any rule,

regulation or by-law of such corporation, or in obedience to any particular instruction given by any person delegated with the authority of the corporation in that behalf," was construed.

It was held that the true construction of the clause requires the words "any person" to be limited so as not to include the person injured. Thus construed, the clause would read: "When such injury resulted from the act or omission of any person (except the person injured), done or made (1) in obedience to any rule, regulation or by-law of such corporation, or (2) in obedience to the particular instruction given by any person delegated with the authority of the corporation in that behalf."

Under this construction the effect of this clause is to prevent the corporation from setting up the defense that the injury to the plaintiff was caused by the act or omission of a co-employee where such co-employee was acting in obedience to the rules, regulations or by-laws of the corporation, or in obedience to the particular instruction given by any person delegated with the authority of the corporation in that behalf.¹

Iowa.

1. Duties Personal to the Master—Vice-principals.

1977. The rule was stated that one to whom an employer commits the entire charge of his business, with the power to choose his own assistants and to control and discharge them as freely and fully as the principal himself could, is not a fellow-servant with those employed under him, and the master is answerable to all under-servants for the negligence of such managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants.²

1978. It was held that one who has charge of a timber yard of a railroad company, and employs and discharges men,

¹ *Dixon v. Western Union Tel. Co.*, 68 Fed. 630.

² *Houser v. C., R. I. & P. R. Co.*, 60 Iowa, 230.

was a vice-principal, and that one who takes his place when absent was temporary vice-principal, and for the negligence of such persons, resulting in personal injury to a subordinate employee, the company was liable.¹

1979. The duty to provide and maintain safe appliances is not one which an employer can delegate to his employees in such a manner as to release himself from responsibility for defects which reasonable care could have avoided; quoting with approval the language of *Morton v. Railway Co.*, 81 Mich. 423, 46 N. W. 113.

This was said where an employee of an ice company was injured by the defective manner in which a slide was constructed.²

1980. It was held that a subcontractor for the building of bridges on the line of a railroad was not a co-servant of those employed in operating the road and managing the trains thereon.³

1981. Those servants who are charged with the duty of inspecting cars are not fellow-servants of those who are engaged in their operation. Where a brakeman was injured by the neglect of such inspectors in failing to discover a defect which ought to have been ascertained in the exercise of proper care and diligence, the company was held liable.⁴

1982. But one who, besides being charged with the inspection and care of machinery, is also charged with the duty of operating the engine which propels the machinery, is to be regarded as a co-employee of one who operates the machinery.⁵

1983. An employee who has no other duty to perform than to inspect the machinery, in the operation of which the injury occurs, is not a fellow-servant.⁶

¹ *Baldwin v. St. L., K. & N. W. R. Co.*, 75 Iowa, 297.

² *Fink v. Des Moines Ice Co.*, 84 Iowa, 321.

³ *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280.

⁴ *Brann v. C., R. I. & P. R. Co.*, 53 Iowa, 596.

⁵ *Theleman v. Moeller et al.*, 73 Iowa, 108.

⁶ *Theleman v. Moeller et al.*, 73 Iowa, 108.

1983a. Where it was alleged in a petition in an action by an employee to recover for injuries received while working for a city in the capacity of a shoveler that the person whose alleged negligence was the cause of the injury was by the board of public works authorized in the name of the city to employ and discharge men and manage the work, and was given entire charge of all employees thus engaged, and of the manner of doing the work, that under such authority and in behalf of the city he assumed control of the work and employed plaintiff to work under his control for the city in performing the work, it was held that the petition sufficiently alleged that such person was a vice-principal.¹

2. Fellow-servants.

1984. It was said that where different persons are employed by the same principal in a common enterprise, no action can be brought against their employer on account of injuries sustained by one employee through the negligence of another. This doctrine is founded upon public policy, and had its origin in the idea that the employee has the means of knowing, equally as well as the employer, all the ordinary risks incident to the service in which he is about to engage, and that these, including the perils that might arise from the negligence of other servants in the same business, entered into the contemplation of the parties in making the contract, on account of which the law implies the servant or employee insisted upon a rate of compensation which would indemnify him for the hazards of the employment. And again, the law supposes that the relation which the several employees sustain to each other, and the business in which they are engaged, would enable them better to guard against such risks than could the employer. Besides, the moral effect of devolving these risks upon the employees themselves would be to induce greater degree of caution, prudence and fidelity than would in all probability be otherwise exercised by them.

¹Hathaway v. City of Des Moines (Iowa), 66 N. W. 188.

It was held that a track inspector or walker, and an engineer, when the former was injured by the negligence of the engineer while operating his train, were fellow-servants.¹

1985. The general rule was stated that a principal is not liable for damages sustained by an employee from the negligence of a co-employee in the same general service, notwithstanding such co-employee's higher authority than the one receiving the injury. This was said where a laborer was injured by the fault and negligence of a boss or foreman having charge and control of the plaintiff.²

1986. Where it appeared that a workman in a mine was injured by a rock falling upon him from the roof, and that the pit-boss knew that the roof was unsafe, and that he directed the road men to put it in safe condition, which was a part of their regular duties, and the road men undertook to make it safe and secure by propping, and informed the workman who received such injury that it was in a safe and good condition, who was thereby induced to work, it was held that the company was not liable; that such road men and the deceased were fellow-servants.³

1987. A mere foreman, as the word is generally understood, that is, a laborer with the power to superintend the labor of those working with him, is a co-employee as far as his own labor is concerned. It was said, however, in relation to one who had charge of a lumber-yard, in a case where an employee was injured by a pile of lumber falling upon him, if his charge involved the duty of maintaining an inspection of the piles, in reference to their security he was in the performance of such duty as superior.⁴

1988. It was held, where it appeared an employee was injured by the fall of a derrick used in raising timbers to a building, and the cause of such accident was the act of another workman in loosening a guy rope, that such workmen

¹ *Sullivan v. Mississippi & Mo. R. Co.*, 11 Iowa, 421.

² *Peterson v. Whitebreast C. & M. Co.*, 50 Iowa, 673.

³ *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576.

⁴ *Baldwin v. St. Louis, K. & N. R. Co.*, 68 Iowa, 37; *Foley v. C., R. I. & P. R. Co.*, 64 Iowa, 644.

were fellow-servants, and the master was not responsible for the injury.¹

1989. It was held, where several employees of a railroad company were traveling upon a hand-car under the charge of a conductor or boss, that such employees are not chargeable with any negligence of such boss in the management of the car.²

1990. The doctrine was repeated, that the mere fact that one whose negligence caused the injury is higher in authority than the one receiving the injury does not constitute him a vice-principal. And it was held, where it appeared that, in the absence of the superintendent of a mine, one of the employees who worked wherever he was directed, though he had charge of the tools and kept the time of the men, and at times may have given directions to the men in regard to their work, directed an employee to get a scraper, which he did, and he got upon a car and put the scraper on also, and in the attempt to descend he was injured by reason of the appliances used to let down the cars being defective, but which appliances were constructed by the employees in the absence of the superintendent, that the servant giving such order was but a co-employee.³

3. Statute.

1991. Code, section 1307, provides: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents or by any mismanagement by the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railroad on or about

¹ Neilson v. Gilbert, 69 Iowa, 691.

³ Wilson v. Dunreath R. S. Co.,

² Hoben v. Burlington & Mo. R. Co., 20 Iowa, 562. 77 Iowa, 429.

which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The foregoing is the statute as amended in 1872 and 1873.

1992. The original statute, section 7 of the act of 1872, was as follows: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents or by any mismanagement of the engineer or other employees of the corporation, to any person sustaining such damages."

1993. The provisions of the original act were held not to be in violation of section 29, article 3; section 6, article 1, and section 30, article 3, of the constitution.¹

1994. Nor in violation of the fourteenth amendment to the federal constitution.²

1994a. This statute merely substitutes the act of the servant for that of the master, and makes the carelessness of such servant that of the employer, and as the duty of the master towards his servant is that of the exercise of ordinary care, only the same standard of duty measures the acts of his servants.³

1995. The representatives of a person who suffers death by reason of the negligence of the agents or employees of a railroad company, under the Iowa statutes, are entitled to recover the damages sustained by reason of such negligence.⁴

1996. The term "employee," as used in the statutes, applies to conductors, agents, superintendents and others engaged in the operation of the road, and the like, and not to contractors or persons building or constructing a road-bed, or laying down the ties and rails.⁵

1997. The statute is not to be construed to mean that an action can be maintained by trainmen only, or by men whose employment is such as pertains to the running of

¹ *McAunich v. Mississippi & Mo. Iowa*, 363; *Kroy v. C., R. I. & P. R. Co.*, 20 Iowa, 338. *R. Co.*, 32 Iowa, 357.

² *Bucklew v. Central Iowa R. Co.*, 64 Iowa, 603. ⁴ *Philo v. Illinois Cent. R. Co.*, 33 Iowa, 47.

³ *Hunt v. C. & N. W. R. Co.*, 26 ⁵ *Ney v. Dubuque & Sioux City R. Co.*, 20 Iowa, 347.

trains. Track-men, switch-tenders and others whose duty requires them to be upon the track are more or less exposed to the hazards of the business of railroading, and such employees, when injured by the use or operation of the road, and by the negligence of co-employees, are as plainly within the provisions of the statutes as those whose duty requires them to assist in the running of the trains. "We think," say the court, "the proper test in determining the question is, Does the duty of the employee require him to perform services which expose him to hazard peculiar to the business of using and operating a railroad?" It was accordingly held that a complaint which alleged that a detective employed by the company was ordered to walk the track of the road, and while insensible upon the track was run over and injured, caused by the negligence of an engineer in charge of a train, stated facts which brought him within the provisions of the statute.¹

1998. It was held, where the plaintiff's petition failed to aver and the evidence failed to show that he was anything more than a section-hand, and that when injured he was engaged in loading a car, that such services did not pertain to the operation of the road.

This case was distinguished from *Deppe v. Railway Co.*, 36 Iowa, 52, and *Schroeder v. Railway Co.*, 47 Iowa, 375, on the ground that in those cases the duty of the employee required him to ride upon the cars. Why this case is distinguished from *Pyne v. Railway Co.*, 54 Iowa, 223, the court does not state.²

1999. A receiver operating a railroad under the appointment and direction of the court is included under the term "persons owning or operating railways," in contemplation of the statute, and the property in his hands is liable for the claims of the employee for injuries received through the negligence of co-employees.³

¹Pyne v. C., B. & Q. R. Co., 54 Iowa, 223.

³Sloan v. Central Iowa R. Co., 62 Iowa, 728.

²Smith v. B., C. R. & N. R. Co., 59 Iowa, 73.

2000. It was held that a person employed as a section-hand, whose duty it was, with others, to keep a certain distance of the railroad in repair, and to go with them on the track in a hand-car for that purpose, and who was injured by collision with a moving train, was within the statute.¹

2001. It was held that an employee engaged in the work of tearing down and removing an old bridge, and who at the time of the injury was directed to go upon a train of cars loaded with timber of the old bridge for the purpose of assisting in unloading it, and, while such cars were in motion, the timber, by reason of the negligent manner in which it was loaded, were thrown off the cars, carrying plaintiff with it, causing him injury, was not within the provisions of the act. It was said that this change of the rule of the common law extends no further than to employees engaged in the business of operating railroads, and not to all persons employed by the corporation without regard to their employment. The removal of an abandoned bridge certainly has ordinarily no connection with running railway trains or the use of a railroad.²

2002. A company which is engaged in the construction of a railway, and to that end running a train laden with gravel, is operating a railroad within the meaning of the statute. One who was engaged in shoveling gravel from the train and had nothing to do with the operation of it was held to be within the benefits of the statute.³

2003. It was held that a laborer in a machine-shop of a railway company, who was injured by a locomotive driving-wheel which plaintiff and other employees were moving by hand, was not within the benefits of the act, and that he was in no manner connected with the operation of the railroad.⁴

¹Frandsen v. C., R. I. & P. R. Co.,
36 Iowa, 372.

³McKnight v. Iowa & Minn. R.
Co., 43 Ia. 406.

²Schroeder v. C., R. I. & P. R. Co.,
41 Iowa, 344. See Same Case, 47
Iowa, 375.

⁴Potter v. C., R. I. & P. R. Co., 46
Iowa, 400.

2004. The statute was held to include a foreman of a crew, with power to direct the men under him in their work, and to hire and discharge them at will, who received injuries by reason of the negligence of the men in his crew.¹

2005. It was held that a car-repairer, whose duty it was to repair cars on the track, but who had nothing to do with the cars in motion, except to ride on passenger or freight trains to and from the places where his services were required, was not engaged in the operation of a railway within the meaning of the statute.²

2006. It was held that an employee, whose occupation was that of sweeper in the round-house of a railroad company, who was injured by falling into a hole which had been carelessly uncovered by other employees, was not within the provisions of the law.³

2007. It was held that one whose duty it was to wipe defendant's engines, and do other work about the round-house, and to open the door of the round-house so as to allow the engines to pass in and out, and who, while endeavoring to shut the doors, was injured by the carelessness of his co-employees who were at the time engaged with him in the same effort, was not within the provisions of the law.⁴

2008. And this notwithstanding that he may have other duties to perform which do pertain to the operation of the road. The court held that the last clause of the statute as amended created a limitation as to the class of acts for which the company is liable, which do not exist under the former statute; so that to entitle an employee now to recover against the company for injuries which he had sustained in consequence of the negligence or mismanagement or wilfulness of a co-employee, he must show (1) that he belonged to the class of employees to whom the statute affords

¹ *Houser v. C., R. I. & P. R. Co.*,
60 Iowa, 230.

² *Foley v. C., R. I. & P. R. Co.*, 64
Iowa, 644.

³ *Manning v. B., C. R. & N. R. Co.*,
64 Iowa, 240.

⁴ *Malone v. B., C. R. & N. R. Co.*,
61 Iowa, 326.

a remedy, and (2) that the act which occasioned the injury was of the class of acts for which remedy is given.¹

2009. It was held that one employed in a railroad coal-house, and injured by the negligence of a co-employee while loading coal upon a car, could not recover from the company, because the injury in such case is not in any manner connected with the use and operation of a railroad.²

2010. It was held that a plaintiff, who was a member of a construction gang on defendant's railway, whose duties required him to go and ride upon and to work upon and about defendant's cars and tracks, who was injured by the negligence of a co-employee in throwing a heavy stone upon his hand while engaged in placing stones under the ends of ties, was not within the provisions of the law, because the injury was not in any manner connected with the use or operation of a railway.³

2011. It was held that one whose sole duty was to elevate coal to a platform, convenient for delivering it to the tenders of engines, was not employed in the use and operation of a railroad, not being in any way connected with the moving and operation of trains. The court say: "What is the use and operation of a railway? It is constructed for the purpose of movement of trains—that is the sole use. What is the operation of a railway? They can be operated in no other way than by movement of trains."⁴

2012. It was held that an employee of a company, whose duty it was to assist in loading and unloading gravel cars, and to perform other service as required in and about the work in hand, and to ride back and forth on the cars between the gravel pit and places where the gravel is distributed, was employed in the operation of the road, within the meaning of the statute, though his injuries were received

¹ *Malone v. B., C. R. & N. R. Co.*,
65 Iowa, 417.

² *Luce v. C., St. P., M. & O. R. Co.*, 67 Iowa, 75.

³ *Matson v. C., R. I. & P. R. Co.*,
68 Iowa, 22.

⁴ *Stroble v. C., M. & St. P. R. Co.*,
70 Iowa, 555.

while unloading such cars by a falling bank pressing against the wheels of the engine while moving slowly.¹

2013. The working of a ditch machine on a railroad which is operated by the movement along the track of the train of which it forms a part was held to be an employment connected with the use and operation of a railroad, within the meaning of the statute, and that employees engaged in operating it are within the provisions of the act.²

2014. Where a mechanic from one of defendant's shops, acting under the order of his superior, was working, as commanded, on a ladder leaning against defendant's train, and was injured by movement of the train without notice to him, it was held that he was engaged in duties connected with the use and operation of the railroad; and it made no difference that he was not engaged in the operation of the road, as the negligence was that of one or more who were charged with responsibility with respect to the movement of trains.³

2015. Where an employee, one of a crew of section-hands engaged in removing snow and ice from the track, was directed to go upon moving cars and unload slack therefrom and was injured, it was held that he was within the provisions of the act.⁴

2016. It was held that a wiper who had temporary charge of an engine making up a train was engaged in the operation of the road, and the company was liable to a brakeman for injury received while coupling cars, caused by such wiper's negligence.⁵

2017. Where a plaintiff was employed by a railroad company as a snow shoveler in clearing its tracks of obstruction by snow, and he was required to ride from one obstruction to another in the caboose of a train, it was held that he was

¹ *Handelun v. B., C. R. & N. R. Co.*, 72 Iowa, 709.

² *Nelson v. C., M. & St. P. R. Co.*, 73 Iowa, 576. See Same Case, 77 Iowa, 405.

³ *Pierce v. Central Iowa R. Co.*, 73 Iowa, 140.

⁴ *Rayburn v. Central Iowa R. Co.*, 74 Iowa, 637.

⁵ *Whalen v. C., R. I. & P. R. Co.*, 75 Iowa, 563.

an employee engaged in the operation of a railroad within the meaning of the statute.¹

2018. Where one of a section crew was injured while working on a hand-car holding a shovel on the rail to remove snow from the track, claimed to be due to the negligence of a co-employee riding on the same car, it was held that he was engaged in connection with the use and operation of a railway within the meaning of the statute.²

Kansas.

1. Duties Personal to the Master—Vice-principals.

2019. A foreman or boss car-repairer of the defendant company was put in charge of three subordinate car-repairers, whose duty it was to repair cars while standing on the track. The company left everything concerning the work of repairing cars, controlling of the employees and their protection while engaged in their work to such foreman or boss car-repairer. No notice or warning was given such laborers while engaged in their work of the approach of cars, nor were signal flags furnished. It was held that it was the duty of the foreman or boss car-repairer, as a representative of the company, to see that reasonable precautions were taken to protect and guard his subordinates while engaged in the discharge of their duties, and for his neglect in this respect the company was liable.³

2020. In all cases at common law the master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, and whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent or employee stands

¹Smith v. Humeston & S. R. Co.,
78 Iowa, 583.

³Hannibal & St. J. R. Co. v. Fox,
31 Kan. 586, 3 Pac. 320.

²C. M. & St. P. R. Co. v. Artery,
137 U. S. 507.

in the place of the master, and becomes the substitute of the master, a vice-principal, and the master is liable for his acts of negligence.¹

2020a. It is the personal duty of the master to furnish a safe place for his employees to work, and the failure of those who have been selected to protect the roof of a mine against falling rock is chargeable to him.²

2021. In speaking of officers, agents and servants of a railroad company, empowered to furnish proper implements, machinery and materials for the employees to operate, it was said: "These higher officers, agents or servants cannot, with any degree of propriety, be termed fellow-servants with the other employees, who do not possess any such extensive power and have no choice but to obey such superior officer, agent or servant. They must be deemed, in all cases, when they act within the scope of their authority, to act for their principals, in the place of the principal, and in fact to be the principal. If an employee performs the duties of one of the higher officers, agents or servants mentioned, the company is generally responsible for his negligence, whatever may be his grade."³

2022. The foregoing rule was applied, and it was held that the road-master of a railroad company, upon whom was imposed the duty of directing the repairs of the road and keeping the road in a safe condition, is in the line of his duty the representative of the master, and where he fails to direct repairs and keep the road in a safe condition, it was held that the railroad company was liable to one of its servants who was injured by reason of such neglect.

The facts were that he received word from a conductor that the water was rising in some of the creeks, and if the rain continued it was liable to wash the road. He left a message with a telegraph operator for the train-dispatcher, telling him

¹ *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 633.

³ *Kansas Pacific R. Co. v. Salmon* 14 Kan. 390.

² *Cherokee & P. Coal Mining Co. v. Britton* (Kan. App.), 45 Pac. 100.

not to send any trains over that division until he could go over it in the morning with a work train. He did not wait to see that it was sent, and in fact it was not sent. He had subject to his orders an engine, a hand-car and section-men. The reason the message could not be sent was that the wires were down, and the road-master testified that if he had known that his message had failed to reach its destination, he could have taken an engine or hand-car and gone down that night over the road. The jury found there was a failure of duty on his part.¹

2023. A section foreman or section boss in the employment of a railroad company is not a co-employee or fellow-servant with an engineer having charge of a locomotive engine drawing a railroad train, within the meaning of the rule of the common law, which exempts the master from liability for negligence between co-employees or fellow-servants.

In this case the engineer was injured by reason of the neglect of the section boss in respect to repair of the track.

In speaking of two classes of cases in which employees of the same master are not such co-employees, the first relating to superior and subordinate, it was said: "The other class of cases is that the master will be liable to one employee for the negligence of another where two or more sets of employees are engaged in different lines of employment; as, for instance, where one set of employees has charge of a railroad train and its operation, while the other is to keep the road in proper condition and repair. In the present case the general roadmaster and the division roadmaster and a section foreman and his assistants were in one line of duty, while the trainmen were in another and a different line of duty, and each set, within its own line of employment, represented the master as to the other set, and the members of one set were not the mere fellow-servants with the members of the other set."²

2024. A car-repairer or inspector in the employment of a railroad company is not the co-employee or fellow-servant

¹ Atchison, T. & S. F. R. Co. v. Moore, 31 Kan. 197, 1 Pac. 644.

² St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408.

of a truckman in operating a truck, and the company is liable to the truckman for injuries received in the performance of his duties through the negligence of the company's inspector of machinery in failing to discover and remedy the defect, when the defect, by the exercise of ordinary and proper diligence, might have been known before the infliction of the injury.¹

2025. An employee in a planing mill was injured while guiding a board through a planing machine, the board striking a timber placed by another employee in a boring machine. The board was so disarranged that one of the plaintiff's hands came in contact with the knives in the planing machine. It was claimed the machines were placed too close together. It was held that those employees to whom was assigned the duty of making the place of work safe were vice-principals, and the question should have been submitted to the jury.²

2026. An employee was injured in Missouri, and in the action brought in Kansas it appeared that an open car in a construction train was loaded with coal, and upon the top of the load two smoke-stacks were loosely placed. The duty of loading such cars devolved upon the station-agent and not upon the trainmen, and it was the duty of the yard-master, and in his absence the station-agent, to see that open cars were properly inspected and prepared to be put into a train for transportation. A brakeman, while upon the car, was injured by the loose smoke-stacks pushing forward, throwing him under the car. It was held that it was the duty of the company to properly prepare and inspect a car before it was turned over to the trainmen, and they did not stand, as a rule, in the relation of fellow-servants, and that the company was liable for the negligence of such inspectors.³

¹ *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484.

² *Griffin v. O'Neil*, 48 Kan. 117, 29 Pac. 144.

³ *Atchison, T. & S. F. R. Co. v. Seeley*, 54 Kan. 21, 37 Pac. 104. See, also, *Railway Co. v. Barber*, 44 Kan. 612, 24 Pac. 969.

2. Fellow-servants.

2027. A conductor and brakeman running on the same train are fellow-servants.¹

2028. An engineer operating a train in a railroad yard, and a watchman or yard-master in the yard, are fellow-servants, where the latter is injured in coupling cars by the negligence of the former.²

2029. A foreman who has merely the charge of operating some particular part of the work is a fellow-servant of employees under him.³

3. Statute.

2030. Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence, or by mismanagement of its engineers or other employees, to any person sustaining such damage. (General Statutes 1889, paragraph 1251.)

A statute substantially the same was enacted as early as 1874; it was borrowed from Iowa.

2031. Chapter 93 of the Laws of 1874 does not deny to railroad companies the equal protection of the law guaranteed by the fourteenth amendment to the constitution of the United States, and is not in conflict therewith.⁴

2032. A section-man employed by a railroad company to prepare its road-bed and take up old rails out of its track and put in new ones, who was injured, without fault on his part, by the negligence of other employees in permitting an iron rail, intended to be placed in the track, to fall on him while he was assisting to remove the iron rail from a push-car on the track, was held to be within the terms of section 1 of the statute of 1874.

¹ *Dow v. Kansas Pacific R. Co.*, 8 Kan. 642.

² *Union Pac. R. Co. v. Millikin*, 8 Kan. 647.

³ *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412.

⁴ *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291, citing *Railway Co. v. Haley*, 25 Kan. 35; affirmed, 127 U. S. 205.

The statute of Iowa is distinguished. It was claimed that the amendment of 1872 of the Iowa statute so changed the prior act as to allow employees of railroad companies to recover against the company for injuries received from the negligence of co-employees only "when such wilful wrongs are in any manner connected with the use and operation of the railroad, so owned and operated, on or about which they shall be employed," and therefore the rule in that state which confines the benefit of the act to those persons injured through the negligence of a co-employee, while they or either of them are in the use and operation of a railway, has no application.¹

2032a. A section-man is within the benefits of the statute.²

2033. Where an employee of a railroad company was injured while in the act of loading rails upon a car, by the act of other employees in letting the rail fall from a pile upon him, it was held the character of the employment placed him within the provisions of the act of 1874.³

2033a. It was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool-car, was within the statute.⁴

2033b. The act of 1874 was held to apply to every railroad company organized in the state, and to every railroad company doing business in the state, but its provisions did not include firms, partnerships or individuals having servants or employees engaged in work upon the road or trains of a railroad corporation. A firm or partnership composed of private persons, not being a railroad corporation, or a *de facto* railroad corporation having a subcontract to construct a part of the road of a railroad corporation, organized under the laws of the state and operating cars and trains on

¹ Union Pac. R. Co. v. Harris, 33 Kan. 416, 6 Pac. 571.

³ Atchison, T. & S. F. R. Co. v. Koehler, 37 Kan. 463, 15 Pac. 567.

² Atchison, T. & S. F. R. Co. v. Vincent, 56 Kan. 344, 43 Pac. 251.

⁴ Railway Co. v. Haley, 25 Kan. 35.

the road, and employees at work upon the road and in charge of their trains, are not within the terms of the law.¹

2033c. A section-hand employed by a railroad company, injured while unloading ties from a car for the purpose of repairing the company's track, caused by the negligence of a co-employee, was held to be within the terms of the act.²

2033d. A bridge carpenter, employed by a railroad company in loading timbers onto a railroad car for transportation to another point on the company's line, was held to be within the provisions of the statute.³

2033e. The statute was held to apply where one employee was injured by the negligence of another while both were engaged in the round-house in putting a recently arrived engine in condition for immediate use.⁴

Kentucky.

1. Rule.

2033f. The implied undertaking between a railroad company and its employees in the same class of service does not exonerate the company from liability for damages resulting to one of such co-agents from extraordinary or gross negligence of another of such agents in the same line of service. Gross neglect is either intentional wrong or such reckless disregard of security and right as to imply bad faith, and therefore squints of fraud, and is tantamount to the *magna culpa* of the common law, which in some respects is *quasi-criminal*.⁵

2033g. The rule that, where one of two fellow-servants is injured by the negligence of the other, the common employer is not liable therefor, does not apply in cases of wil-

¹ Beesen et al. v. Busenbark, 44 Kan. 669, 25 Pac. 48.

² Atchison, T. & S. F. R. Co. v. Brassfield, 51 Kan. 167, 32 Pac. 814.

³ C., K. & W. R. Co. v. Pontius, 52 Kan. 264, 34 Pac. 739, 157 U. S. 209.

⁴ C., R. I. & P. R. Co. v. Stahley, 62 Fed. 363.

⁵ Louisville & N. R. Co. v. Robinson, 4 Bush (Ky.), 507; Louisville & N. R. Co. v. Filbern, Adm'x, 6 Bush (Ky.), 574.

ful neglect if the two servants are not co-equals. An engineer and a brakeman on the same train are not co-equals, and the company is liable for the death of the latter caused by the wilful neglect of the former.¹

2033h. The rule that, where two servants are in the same field of labor and in the same grade of employment, the one not superior nor subordinate to the other, neither can recover of his master for an injury caused by the neglect of his co-laborers, applies as well to an action under the statute for wilful neglect as to a common-law action for neglect.

Where laborers, at work on a railroad in transporting dirt on small truck-cars a short distance, alternately acted as brakemen, they were in the same grade of employment, and no recovery can be had for injury to one by neglect of another, although the negligent laborer was at the time acting as brakeman and the injured laborer was not, the one being as much a brakeman as the other.²

2033i. Where a number of persons contract to perform service for another, the employees not being superior or subordinate the one to another in its performance, and one is injured through the negligence of another, they are regarded as the agents of each other, and no recovery can be had against the employer. But a subordinate in the same service can recover against the employer for the negligence of other employees who had the right to control and direct him, or who were his superiors with reference to the discharge of the duties pertaining to the work, or over whose actions he had no control or right to advise.³

2033j. An employee cannot recover for the negligence of a co-employee, superior in authority, unless the latter is guilty of gross negligence. This rule was stated where an employee, engaged to carry iron plates to and from a shearing machine under the immediate control and management

¹ Louisville & N. R. Co. v. Brooks, Adm'r, 83 Ky. 129.

² Casey v. Louisville & N. R. Co., 84 Ky. 79.

³ Louisville, C. & L. R. Co. v. Cavens, Adm'r (Ky.), 9 Bush, 559; Fort Hill Stone Co. v. Orm, Adm'r, 84 Ky. 183.

of another employee, was injured while attempting to oil the machine, as alleged, while obeying the order of the employee operating it, who was temporarily absent.¹

2. Duties Personal to the Master — Vice-principals.

2034. A laborer while assisting an engineer to right his engine, which seemed to be out of order, was injured by the engine moving forward. It was held that the engineer was the agent of the company and not the fellow-servant of the injured laborer. The responsibility of such an agent is graduated by the classes of persons injured by his neglect or want of skill. As to strangers, ordinary neglect is sufficient; as to subordinate employees associated with him in conducting the cars, the negligence must be gross. But as to employees in a different department of the service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental but independent service, no one of them, as between himself and his co-equals, is the corporation's agent, and therefore is not, on the principal of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it.²

2035. The employees of a railroad company controlling and directing the movements of one train must, with reference to those controlling another, be regarded as agents of the company, and the company is responsible for injuries to a person of the one class resulting from the negligence of one of the other.³

2036. The master is liable for an injury to one servant by the neglect of another, although they may be engaged in

¹B. F. Avery & Sons v. Meek (Ky.), 28 S. W. 337.

³Louisville, C. & L. R. Co. v. Cavens, Adm'x (Ky.), 9 Bush, 559.

²Louisville & N. R. Co. v. Collins (Ky.), 2 Duvall, 114.

the same common employment, provided the negligent one is superior to or in control of the injured one. Hence, it was held that a railroad company was liable for an injury to a brakeman caused by the wilful or gross neglect of the conductor or engineer in charge of the train.¹

2036a. A railroad engineer and the porter on the same train are not fellow-servants.²

2037. Where the conductor of a train which was about to start directed the foreman of the car-repairers to go under it and fix a brake, and such car-repairer was run over by the backing of the train while he was known by the conductor to be there, the railroad company was held liable under the rule of *respondeat superior*. This upon the ground that the train and its movements were then subject to the order of the conductor, and he was therefore *pro hac vice* the superior of the deceased and a representative or *alter ego* of the company. If a superior orders a subordinate into a place of danger, it is his duty to protect him, and in the performance or omission of this duty the superior represents the principal.³

2038. It was held that an engineer of a passenger train who was injured in a collision with a freight train could recover from the defendant company, where the accident was caused by the negligence of those in charge of the freight train. The same reasoning was applied as in *Railroad Co. v. Cavens*, *Adm'x*, 9 Bush, 559.⁴

2039. The train had parted, and the engineer ran ahead with the front section and whistled for brakes, repeating it so often as to alarm the people along the road. He ran on thus two and one-half miles, passing one station, then checking the front section, and almost as soon as he did so the rear section ran into it, injuring a brakeman who was on the engine so that he died after nine hours, during which he

¹ Louisville & N. R. Co. v. Moore, 83 Ky. 675.

² Cin., N. O. & T. P. R. Co. v. Palmer (Ky.), 33 S. W. 199.

³ Ritts. *Adm'x*, v. Louisville & N. R. Co. (Ky.), 4 S. W. 796.

⁴ Kentucky Cent. R. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691.

was unconscious. The other brakeman and the conductor were in the caboose and did not discover the train had parted. It was held that the conductor, in such case, was the representative of the company, and not a fellow-servant of the injured brakeman; that such conductor was wilfully negligent, and the case justified the award of exemplary damages.¹

2040. A railroad yard-switchman and a locomotive engineer are not fellow-servants, where a switchman is injured by the negligence of such engineer. The engineer is his superior.²

2041. Where it appeared that plaintiff, a brakeman, was directed by the conductor to uncouple two cars while the train was moving, and the conductor signaled and then went about other work, and the plaintiff, thinking the conductor was near to protect him, stepped in to uncouple the cars, inside the track, and his foot caught in a splinter in the guard-rail and he was run over, and it appeared that the engine was operated by the fireman, who had not been declared competent to handle an engine as required by rule, it was said: "There was some negligence on the part of the employee's superior to the plaintiff in point of employment and control of the train. It is true that there must have been gross negligence before the plaintiff could recover, but, as was stated in another case, certainly the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence. The instruction that if the risk and danger of going between the cars was apparent to the plaintiff when he went in to do the uncoupling he could not recover was erroneous, for if the engineer and conductor deserted him at such time, the company would not be relieved of the consequences of their negligence."³

¹Newport News & M. V. R. Co. v. Dentzels, Adm'r, 91 Ky. 42, 14 S. W. 958.

²Louisville & N. R. Co. v. Sheets (Ky.), 13 S. W. 248.

³Greer v. Louisville & N. R. Co., 94 Ky. 169, 21 S. W. 649.

3. Fellow-servants.

2042. Engineers and brakemen are held to be in the same class or line of service, and the fact that the engineer served on a passenger and the brakeman on a freight train does not affect the reason and policy of implying, as between themselves, such association, knowledge and trust as to have induced an undertaking mutually to assume the risks which the ordinary skill and care of each other in his line of service could not avert.¹

2043. Where an employee at work in connection with the operation of a stone-crusher at the foot of an incline was injured by a car loaded with stone coming down the incline uncontrolled, caused by the neglect of some of the employees to attach the cable to it, it was held there could be no recovery against the employer, as the negligent servants were co-equals or fellow-servants of those injured.²

2043a. A porter upon a train, injured while engaged with the engineer in making up a train through the fault of such engineer, in order to recover must show that the negligence of the engineer was gross.³

2044. Where the foreman over plaintiff and other railroad hands ordered them to throw down a rail they were lifting, and the plaintiff, as he testified, not being ready to put it down, was injured when it was dropped by the men at the other end, it was held the railroad company was not liable for such injuries, as they were not due to any negligence on the foreman's part, but resulted either from plaintiff's disobedience of the order or the carelessness of his fellow-servants in dropping the rail too soon.⁴

Louisiana.

2044a. Where it was alleged that the injury to a brakeman while engaged in coupling cars was due to the negligence of the engineer in the manner in which he moved the train

¹ Louisville & N. R. Co. v. Robinson, 4 Bush (Ky.), 507.

² Fort Hill Stone Co. v. Orm, Adm'x, 84 Ky. 183.

³ Cin., N. O. & T. P. R. Co. v. Palmer (Ky.), 33 S. W. 199.

⁴ Coffman v. Louisville & N. R. Co. (Ky.), 18 S. W. 1012.

against a stationary car, it was said (the case being decided upon other grounds), in the particular operation of coupling trains, doubtless the relations between engineer and brakeman have all the features of fellow-service; and as already intimated, if the engineer's negligence was the sole cause of the injury, the overwhelming weight of authority would exempt the company from liability.¹

2044b. Where the question was whether the principal was liable for the negligent manner in which his contractor demolished a building, to an employee of such contractor injured while engaged in such work by reason of such negligence, it was said, in reference to the proposition that such contractor was himself an employee, that, if this were true, he would be as to such injured servant a vice-principal or direct representative of the master. (Citing approvingly *Chicago, etc. R. Co. v. Ross*, 112 U. S. 377.)²

2044c. An engineer of a construction train was killed by the breaking of a bridge not completed, but used in connection with the construction of the road. The insufficiency of the bridge for such use, and the rate of speed at which the engineer propelled the engine, were the alleged causes of the disaster. While it must have appeared that the engineer knew and appreciated the danger of passing over the bridge at an unsafe rate of speed, it was held that the conductor in charge was negligent in not signaling him to slacken the speed of the train at that place, and practically that the engineer was free from contributory negligence in not doing so without signal. It was further held that the conductor was a vice-principal; and it was said that the case of *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, has made an inroad on jurisprudence in the right direction, and we have applied the new principle there established at the present term. (Referring to the case of *Towns v. Railroad Co.*, 37 La. Ann. 630.)³

¹ *Towns v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 630.

³ *Van Amburg v. Railroad Co.*, 37 La. Ann. 650.

² *Faren v. Sellers*, 39 La. Ann. 1011.

2044d. A laborer engaged as a passer of coal at the boilers of defendant's ice factory was killed by the explosion of one of the boilers. The explosion was caused by the formation of a "bag" on the boiler. About three hours prior to the explosion the fireman notified the engineer and superintendent in charge of the formation of the "bag," who, in turn, ordered the fireman to put out the fires and put the boiler out of service. It did not appear that the fireman complied with the order. Such engineer had charge of the whole factory, with authority to employ and discharge the fireman and other employees, including the deceased. It was held that such engineer was a vice-principal in respect to the deceased. That the giving of the order to the fireman to cut off the boiler was not sufficient to relieve the master. That the rule referred to by Bailey in his work on "Master's Liability," page 129, as prevailing in particular states, in substance that the master (as to repairs) is personally present all the time, even in the performance of actual labor, is adopted to the extent only that the knowledge of the vice-principal, who is present, that machinery is dangerously defective, is the knowledge of the principal.

It was said: It is not the mere fact that the chief engineer had control over the fireman and the coal-passer that destroys the relation of fellow-servants, but the additional fact that he succeeded the superintendent and vice-principal; that he had full authority to provide for the safety of the servants and had the management of the factory; and in view of the further fact that it is the duty of the master to supply machinery and tools and to see to their repair, and that they are kept in good repair.¹

Maine.

1. Duties Personal to the Master — Vice-principals.

2045. The risks which a servant assumes includes the use, not the purchase, of machinery. The person whose

¹ *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535.

duty it is to keep the machinery in order is not in any legal sense the fellow-servant of the employee whose duty requires him to use it. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common results. The one can properly be said to begin only where the other ends. The two persons may indeed work under the same master and receive their pay from the same source, but this is not sufficient. They must be engaged at the time in a common purpose or employed in the same general business.

This was held where a girl, while engaged in cleaning machinery with exposed gearings (the covering having become broken and not then replaced), had her hand caught therein and received injuries. It was said that she, so far as regards the repairs of the machinery, stood in the same position as any person not a servant, but who was rightfully in her position, and the same responsibility rested upon the master for the acts of himself or servants as would in such a case. She was denied recovery, however, on the ground of contributory negligence.¹

2046. The act of a superintendent of a railroad company is the act of the company. His negligence is its negligence. And a train-dispatcher or other officer acting in his place or performing his duties stands in the same relation.²

2. Fellow-servants.

2047. The rule that employees assume the risk of negligence on the part of their fellow-servants was said to apply to all who are engaged in the common business, whatever relation of subordination they sustain to each other, and was applied to the act of a foreman, who, with knowledge that

¹ *Shanny v. Androscoggin Mills*,
66 Me. 420.

² *Lasky v. Canadian Pac. R. Co.*,
83 Me. 461.

a loose timber was so placed that injury was imminent to employees working beneath it, failed to remove it.¹

2048. Where there is one general object, in attaining which a servant is exposed to risks, if he is injured by the negligence of another whilst engaged in the furthering of the same object he is not entitled to sue the master, and it does not matter that they are not engaged in the same kind of work. Nor is the rule altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey. This was said where a section-man was killed by the alleged negligent manner in which an engineer ran his engine.²

2049. Persons who are employed under the same master, derive authority and compensation from the same common source and are engaged in the same general business, although one is foreman of the work and the other is a common laborer, are fellow-servants.

An exception to the rule exists if the master has delegated to the foreman or superintendent the care and management of the entire business or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master.

It was held, however, where a crew of men were engaged under a foreman or superintendent in repairing a dam for a log-driving company incorporated by the law of the state, where one of the laborers was injured by the carelessness of another, who acted under the direction and immediate observation of the foreman in doing the particular act complained of, that the facts did not bring the parties within the exception, and that the foreman and laborer were fellow-servants.³

¹ *Beaulieu v. Portland Co.*, 48 Me. 291.

³ *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143.

² *Blake v. Maine Central R. Co.*, 70 Me. 60.

2050. A person in charge of a railroad construction train ordered an employee to jump upon a car from a station platform while the train was in motion. He caught hold of a stake in a platform car, the stake at the time not being properly secured by the dog or pawl which serves to keep the stake in a firm and upright position, and thereby fell under the wheels and was injured. It was held that the conductor who gave the order and the employee who neglected to put the pawl in place were fellow-servants with the employee who was injured.¹

2051. Fellow-servants mutually owe to each other the duty of exercising ordinary care in the performance of their service, and whichever fails in that respect is liable at common law for any personal injury resulting therefrom to his fellow-servant.²

2052. The foreman, superintendent or overseer of a job of work is not on that account to be regarded as other than a fellow-servant. Whether an employee occupies the position of a fellow-servant to another depends upon whether the person whose *status* is in question is charged with the performance of a duty which properly belongs to the master. What he is employed to do is a question of fact; in what capacity he acts is an inference of law. Where the facts are not disputed the question is one of law.³

2053. It was said: "It is settled law in this state that an employer is not responsible to an employee for an injury received through the carelessness of a fellow-servant, and it is equally well settled that the foreman, superintendent or overseer of a job of work is not on that account to be regarded as other than a fellow-laborer with those who are at work under him. Such an employment does not elevate him to the dignity of a vice-principal." Hence it was held that a city was not liable for an injury to a laborer employed in constructing a sewer, when caused by the care-

¹ *Cassidy v. Maine Central R. Co.*,
76 Me. 488.

² *Hare v. McIntire*, 82 Me. 240.

³ *Dube v. Lewiston*, 83 Me. 211.

lessness of one who had the oversight and direction of the work.¹

2054. Conductors and engineers are fellow-servants.²

Maryland.

1. Rule.

2055. Where an employee was injured while working with a steam hammer which was alleged to have been defective, it was held that he could not recover, although his injuries were caused by the defective condition of the hammer or by negligence of the agents of the defendant, or by both combined, without showing also that the defendant did not use reasonable care in procuring for its operation sound machinery and faithful and competent employees; that the foreman in charge of the shop was the plaintiff's fellow-servant.³

2. Duties Personal to the Master—Vice-principals.

2056. The person authorized by the master to make the selection and purchase of appliances must be taken as the representative of the master, and any omissions or neglect committed by him must be regarded as that of the master, and for which he is liable. These agents are not to be regarded as fellow-servants of those operating it.

The facts were that the superintendent and master mechanic of a railroad company purchased a second-hand engine, the boiler of which exploded, killing the fireman. It was said: It does not follow, however, that because the master mechanic acted in a distinct and special employment in making the selection of the engine, that therefore he was not a fellow-servant with those operating it in his ordinary em-

¹Conley v. Portland, 78 Me. 217; ³Hanrathy v. Northern Central
Dube v. Lewiston, 83 Me. 211. R. Co., 46 Md. 280.

²Lasky v. Canadian Pac. R. Co.,
83 Me. 461.

ployment as master of machinery. Whether he is a fellow-servant of the deceased or not we need not decide.¹

2057. It was said: All the cases agree in holding that there is no obligation on the part of the master to give his own personal supervision to the execution of the work, but that he may delegate that power to a superintendent or foreman. And it is held by all the English cases, and by a decided preponderance of those of this country, that such superintendent or foreman is a fellow-servant within the rule, and that the omission or negligence of such superintendent or foreman is among the incidents of the service, the risks of which the servant takes upon himself as between him and the master when he enters the employment.

To the general rule, however, there is this qualification or exception: that where the middleman or superintendent is intrusted with the discharge of the duties incumbent upon the master, as between the latter and the servant, there the master may be liable for the omissions or neglect of the manager or superintendent in respect to those duties. If the master relinquishes all supervision of the work, and intrusts not only the supervision and direction of the work, but the selection and employment of laborers and the procuring of materials, machinery and other instrumentalities necessary for the service, to the judgment and discretion of the manager or superintendent, in such case the latter becomes a vice-principal, and for his omissions or negligence in the discharge of those duties the principal will be liable.²

3. Fellow-servants.

2058. All who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades and departments of it, are fellow-servants, each taking the risks of the other's negligence.

¹ *Cumberland & Penn. R. Co. v. State to use of Moran*, 44 Md. 283. ² *State to use of Hamlin v. Malters & Reany*, 57 Md. 287.

Where the defect producing the injury was the consequence of the incompetency or neglect of a fellow-servant, or where the origin of the defect did not appear, the master is not liable to the servant, it not appearing that he had been guilty of negligence either in selecting the fellow-servant or in providing the machinery in which the defect occurred.

A brakeman on a train of cars is in common employment with the mechanics in the shops to repair and keep in order the machinery, with the inspector of the machinery and rolling-stock of the road, and with the superintendent of the movements of trains.¹

2059. The plaintiff was engaged in shoveling grain from the cars into the hoppers of an elevator, and being so employed he was ordered by the foreman, whose orders he was required to obey, to assist in hauling in and fastening to the pier of the elevator a vessel to be loaded. The vessel had been brought to the pier by a steam-tug commanded by an employee of the defendant, and the specific act of negligence charged was that the captain of the tug neglected to have the yards of the vessel properly stayed, so as to avoid contact with the elevator building. As a result the yards came in contact with the building, knocking off a piece of slate, which fell upon the plaintiff, injuring him.

It was said: "The liability of the master is not enlarged or made different by the fact that the injured servant is inferior in grade, nor that the offending servant and the one injured should be at the same time engaged in the same particular work." Hence, it was held that the captain of the tug and the employee injured were fellow-servants.²

2060. It was held that an employee at a monthly salary, acting as chief manager in charge of extensive works, without authority to buy new articles or to repair machinery, but who sometimes made slight repairs without orders, who hired and discharged employees, kept and reported their

¹ *Wonder v. Balt. & Ohio R. Co.*,
32 Md. 411.

² *Baltimore Elevator Co. v. Neal*,
65 Md. 438, 5 Atl. 338.

time to the officers of the company, who frequently inspected the works, was but a fellow-servant of a workman who was injured by a carriage in the factory leaving the track, caused by the track being worn and uneven, and the wheels of the carriage being also worn; that his injury was caused by the negligence of the manager in the care of the machinery.¹

2061. A train-dispatcher, employed by the division superintendent, though he has power to employ and discharge brakemen and firemen, and has general charge of the movements of trains, is a fellow-servant of an engineer who is also subject to the directions of the division superintendent.²

2062. Where a laborer of a city working in a sewer was injured by the negligence of an engineer in charge of a steam-hoisting apparatus in permitting the cage to drop, it was held that they were fellow-servants, though engaged in different grades or departments of the service.³

Massachusetts.

1. Rule.

2063. The learned judge who first announced the doctrine of fellow-servant in this country stated the considerations upon which the doctrine was based. After referring to the accepted rule as to the assumption of risk, he said: "And we are not aware of any principles which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know and against which he can as effectually guard as the master. Where several persons are employed in the conduct of one common enterprise and undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the

¹ *Yates v. McCullough Iron Co.*,
69 Md. 370, 16 Atl. 280.

³ *Mayor, etc. of Baltimore v. War*,
77 Md. 593, 27 Atl. 85.

² *Norfolk & W. R. Co. v. Hoover*,
79 Md. 253, 29 Atl. 994.

others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of the other."

Then, in opposition to the department theory, he said: "Where the object to be accomplished is one and the same, where the employers are the same and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of each case. . . . The master is not exempt from liability because the servant has a better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one except himself, and he is not liable in part as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied."

The offending servant was one whose duties required him to operate a switch, and the injured servant an engineer upon a train.¹

2064. The proprietors of a manufacturing establishment are not responsible to an operative in their employment for an injury such operative sustains in consequence of an accident occasioned by gross negligence and want of skill on the part of their superintendent, both the operative and the superintendent being engaged at the time in the performance of their respective duties.

Referring to prior decisions it was said: "The principle

¹Farwell v. Boston & W. R. Co., 4 Metc. 49.

of these decisions is that, when one person engages in the service of another, he undertakes, as between him and his employer, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of others in the service of the same employer whenever he, such servant, is acting in the discharge of his duty to his employer, who is the common employer of both. It cannot affect the principle that the duties of the superintendent may be different, and perhaps may be considered as of somewhat higher character than those of the plaintiff, inasmuch as they are both the servants of the same master, have the same employer, are engaged in the accomplishment of the same general object, are acting in one common service, and derive their compensation from the same source. The plaintiff and the superintendent must be considered as fellow-servants within the meaning and principle referred to and the other adjudged cases on this subject.”¹

2065. In case of injury to one servant by the negligence of another it is immaterial whether he who causes and he who sustains the injury are not engaged in the same or similar labor, or in positions of equal grade or authority. Hence a car-repairer, while riding to his work on defendant's train, and a switchman by whose negligence he was injured, were fellow-servants.²

2066. Where one who is in the general employment of another, receiving compensation from him, is by such other engaged to a third, to assist its servants in doing a particular work, and while so at work is injured by the negligence of such servants, he is, notwithstanding his general employment, their fellow-servant. The existence of this general relation between him and his immediate employer does not exclude a like relation with a third party to the extent of the special service in which he was actually engaged.

This was held in reference to an employee sent by his employer to do specified work in a trench being constructed

¹ *Albro v. Agawam Canal Co.*, 6 Cush. 75.

² *Gilman v. Eastern R. Corp.*, 10 Allen, 233.

by the defendant city by its servants under direction of its superintendent of sewers.¹

2067. The rule of law that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant is not confined to the case of two servants working in company or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant who causes the injury is a sub-manager or foreman of higher grade or of greater authority than the injured servant.²

2. Duties Personal to the Master — Vice-principals.

2068. Those servants who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are injured in operating it. They are charged with the master's duty to his servants. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even where the same person renders service by turns in each, as the convenience of the master may require.³

3. Fellow-servants.

2069. Two brakemen, one acting in the additional capacity of conductor of a freight train, were held to be fellow-servants.⁴

2070. Where an inspector of cars notified the conductor to leave a space between a defective car and other cars of the train, and while standing in that space, making repairs

¹ Johnson v. Boston, 118 Mass. 114.

³ Ford v. Fitchburg R. Co., 110

² Holden v. Fitchburg R. Co., 129 Mass. 240.

⁴ Hayes v. Western R. Corp., 3 Cush. 270.

upon the car, a newly-loaded car was kicked against such other cars, pushing them upon him and instantly killing him, it was held that the accident resulted either from his own negligence or from that of the conductor, his fellow-servant, and the railroad company was not responsible.¹

2071. An engineer of a train and a section-hand are fellow-servants where the former was injured by the negligence of the latter.²

2072. Where an employee, engaged in assisting in demolishing a building, was killed by the building falling upon him, its fall being caused, as was alleged, by the negligent and imperfect manner in which it was stayed and supported, and the alleged ground of recovery was the failure to warn him of the dangers of the place of work, it was said: "The place in which the work was done was safe and proper, and the only negligence was that of fellow-servants of the intestate in their manner of doing the work in which all were engaged."³

2073. A foreman of a gang of laborers digging trenches is a fellow-servant with the laborers, and his order directing the servant to work in a dangerous place is that of a servant.⁴

2074. Where an employee was injured by having his fingers cut off by a circular saw upon which he was put at work by the defendant's foreman, and it appeared that the plaintiff was hired by defendant as a common laborer; that the defendant was not present when the plaintiff was put at work; that on the morning of that day the plaintiff had asked permission to saw up some lumber on another saw, and had been refused, and that before that day the plaintiff had worked upon a circular saw six or seven times, three of which was upon the saw which caused him injury, it was held that if under these circumstances it was negligence for the foreman to set the plaintiff at work upon the saw, the

¹ Whitmore v. Boston & Maine R. Co., 150 Mass. 477.

³ Conners v. Holden, 152 Mass. 598.

² Clifford v. Old Colony R. Co., 141 Mass. 564.

⁴ O'Connor v. Roberts et al., 120 Mass. 227.

negligence was that of a fellow-workman, and that the action could not be maintained.¹

2075. The rule is established in Massachusetts that the fact that one servant has control over another is immaterial, and that a master is not responsible at common law for the negligence of the superior servant, even in giving orders, whereby injury is sustained by an inferior servant. A negligent order is the same, and within the rule applicable to fellow-servants, whether given to the servant injured or to another servant whose act, in obedience to the order, causes the injury.

The facts were that the alleged negligence was the direction by a foreman of a laborer to unload carboys which contained vitriol from a wagon, and in not warning him of the dangerous character of the material, of which the laborer was ignorant, the laborer being injured by the breaking of a carboy and the spilling of the vitriol.²

2076. Where an employee engaged in work about the erection of a large building was injured by the fall of a derrick used to hoist heavy timbers, the cause of the derrick's falling being the insecure manner in which it was stayed, and it appeared that the foreman in charge personally directed the method of fastening it, it was held that no recovery could be had on account of such negligent direction of the foreman, as he was a fellow-servant, as to such act, of the employee injured.³

2077. Where defendant's servants made up a train of cars with platforms of unequal height, and a brakeman was injured by these platforms lapping one by the other, it was held, the proximate cause being the making up of the train in such manner, no liability on the part of the master was shown, as it was the act of fellow-servants.⁴

¹ O'Brien v. Rideout, 161 Mass. 170.

³ Summersell v. Fish et al., 117 Mass. 312.

² Moody v. Hamilton Mfg. Co., 159 Mass. 70. Patnode v. Warren Cotton Mills, 157 Mass. 283, distinguished.

⁴ O'Connor v. Roberts et al., 120 Mass. 227.

2078. Where an elevator fell, injuring an employee, and the cause of the falling was not definitely shown, and might be attributable to the neglect of an employee who had last used it, it was held there could be no recovery against the employer.¹

2079. The act of an employee in starting machinery while a young boy was cleaning it is the act of a fellow-servant.²

2080. A woman who was employed by a person as a laundress, and who, while being conveyed, either gratuitously or as a part of the contract of employment, from her house to that of her employer, in his wagon, the horse attached to which was driven by his coachman, was injured by the negligence of the latter, was regarded as in the service of the former at the time of the accident, and a fellow-servant of the coachman.³

2081. A laborer and an engineer employed in hoisting coal by means of appliances are fellow-servants, and where the former was injured by the negligence of the latter in failing to stop the tub at a certain height, the act of negligence was held to be that of a fellow-servant.⁴

2082. Where an employee was injured by bales of hay falling upon him while he was working near where they were piled, and it was contended that the master was liable upon the ground of putting him at work in a place thus made dangerous, it was held that the plaintiff and those who piled the hay were fellow-servants, and the defendant was not liable to the plaintiff for an injury resulting from the careless manner in which they did their share of the work in which all were engaged.⁵

2083. An inspector of railroad cars and a brakeman employed in their operation are fellow-servants.⁶

¹ *Kelley v. Boston Lead Co.*, 128 Mass. 456.

² *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374.

³ *McGuirk v. Shattuck*, 160 Mass. 45.

⁴ *Woods v. New Bedford Coal Co.*, 121 Mass. 252.

⁵ *Fitzgerald v. Boston & Albany R. Co.*, 156 Mass. 293.

⁶ *Mackin v. Boston & Albany R. Co.*, 135 Mass. 201.

2084. Mate and common seamen upon a vessel are fellow-servants.¹

2085. A road-master is a fellow-servant with engineers and firemen operating trains, where the latter are injured by the negligence of the former in operating a switch.²

2086. Through the negligence of a competent road-master of a railroad corporation a switch was misplaced, and a locomotive engine and train of cars were turned upon a side-track, the sleepers of which were rotten. The engine and train were thrown from the track, and the engineer and fireman of the engine were injured. It was held they were fellow-servants with the road-master, and could not maintain an action against the company.³

2087. Where a laborer at work in a trench was injured by the neglect of the superintendent, whose compensation was a proportion of the profits, in not properly planking the sides, and there was no evidence that the master failed to furnish sufficient and suitable material for the construction of the safeguards, or that he was chargeable with any specific or personal neglect, or knew of the cause of the accident, it was held that the plaintiff's injuries were attributable to the act of the superintendent, who was a fellow-servant.⁴

2088. A workman engaged in blasting at a quarry assumes the risk of his employment, and cannot maintain an action against his employer for an injury sustained in consequence of obeying an order of another workman who superintends the blasting. They are fellow-servants.⁵

2089. A person employed by a city to superintend the digging of a trench, and a person employed as a laborer to dig the trench by the same master, are fellow-servants.⁶

¹ *Benson v. Goodwin*, 147 Mass. Adm'x, v. *Boston & Maine R. Co.*, 237. 128 Mass. 8.

² *Walker v. Boston & Maine R. Co.*, 128 Mass. 8.

³ *Walker*, Adm'x, v. *Boston & Maine R. Co.*, 128 Mass. 8; *Miller*,

⁴ *Zeigler v. Day*, 123 Mass. 152; *Floyd v. Sugden*, 134 Mass. 563.

⁵ *Kenney v. Shaw*, 133 Mass. 501.

⁶ *Flynn v. City of Salem*, 134 Mass. 351.

2090. A section-boss and the men under him are fellow-servants.¹

4. Servants Selecting Unfit Appliances or Material.

2091. A corporation owning a lighter is bound to use reasonable care in maintaining in suitable condition the appliances used on board the lighter by its servants in hoisting and lowering merchandise; but if it furnishes such appliances and employs a competent servant to see that they are kept in proper condition and provided the means, it is not liable for an injury occasioned to one servant by the parting of a rope in consequence of its being used for too long a time, and after its defective condition was known to the servant whose duty it was to replace it; and whether such servant acted as a fellow-servant or a representative of the master was a question of law.

The court state a rule as follows: "Where a master has furnished suitable structures, means and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in condition to be used, and those who adapt them to use by appliances and adaptations incident to their use, are fellow-servants in the general employment and business. One employed in the care, supervision and ordinary repair of the means and appliances used in the business is engaged in the common service."²

2092. In an action for personal injuries sustained by the plaintiff while in the defendant's employ, by falling from a staging upon the roof of a house, which staging was put up for the purpose of building a chimney, it appeared that the plaintiff, a mason tender, was sent by the defendant to "tend" the defendant's son, who was building the staging. The defendant furnished an abundant supply of materials

¹Clifford v. Old Colony R. Co., Co., 135 Mass. 209; McKinnon v. 141 Mass. 564.

Norcross et al., 148 Mass. 533; How-

²Johnson v. Boston Tow Boat and v. Hood, 155 Mass. 391.

for constructing the staging, but it was not built under his supervision. It was held that if the accident was caused by the negligence of the son in selecting improper materials or improperly fastening them, it was the negligence of a fellow-servant, for which the defendant was not responsible.¹

2093. Where an accident happened by the breaking apart of a freight train, the two cars between which the coupling gave way not belonging to the defendant, whereby a brakeman was killed, it was held that the duty of the company was that of proper inspection. It was also held that the manner of using foreign cars as well as its own might be left by the defendant to competent servants, and that where proper pins for the coupling of cars were supplied, the failure to use them properly, or to replace one too short by a longer one, was the fault of the defendant's servants who used them, fellow-servants of the deceased.²

2094. Where an employee was injured by the fall of a derrick by the breaking of a rope which stayed it, it was said: "Properly to use pulleys, blocks, ropes and other ordinary tools and appliances which have been furnished by a master to the workmen employed upon a derrick is a part of the duty of the workmen. It is incidental to the management and use of the derrick. In working with a derrick the foreman and his assistants are fellow-servants; and the master is not responsible to any one of them for the negligence of any other in the use of materials which the master supplied."

It appeared there was a coil of new rope at hand, and other implements suitable and sufficient for the work. The following cases were cited: *McDermott v. Boston*, 133 Mass. 349; *Kelly v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209; *Moynihan v. Hills Co.*, 146 Mass. 586; *Daley v. Boston & Albany R. Co.*, 147 Mass. 101.³

¹*Kennedy v. Spring*, 160 Mass. 203.

³*McKinnon v. Norcross*, 148 Mass. 533. See, also, *Duffy v. Upton*, 113

²*Thyng v. Fitchburg R. Co.*, 156 Mass. 544.
Mass. 13.

2095. Where a person employed to dig a trench was injured by the caving in of the sides of the trench, it was said: "His employer was not liable, if he furnished the materials for sheathing or shoring up the sides of the trench, and the materials were not used for that purpose by the persons employed by him to superintend the digging of the trench. The superintendent of the work and the plaintiff as a laborer upon the work were fellow-servants, and the duty of such superintendent in using the means and appliances provided for safely and properly carrying on the work was that of a servant engaged in the same business with the plaintiff, even if he acted as the representative of the master in furnishing such means and appliances." (Citing *Albro v. Agarwam Canal Co.*, 6 Cush. 75; *McDermott v. Boston*, 133 Mass. 349; *Flynn v. Salem*, 134 Mass. 351; *Holden v. Fitchburg R. Co.*, 129 Mass. 268.)¹

2096. A brakeman was injured by the breaking of a defective stake, used to hold a load of ties upon a platform car. The evidence showed merely that his employer supplied lumber enough to be sawed into stakes and men enough to prepare them, and that the defective stake was among those so prepared. It was said: "The use of the stake as a means of facilitating the passage of a brakeman from car to car of the train made it the duty of the defendant to use due care to see that it was suitable for that purpose. The case is one of the furnishing of an implement never fit for use, and evidently unfit. Such a stake could not, without negligence, have been placed where stakes were kept, to be used for the purpose to which this was put. The questions of selection by a servant of an unfit implement from a mass furnished by the master, and of the personal duty of the master in respect to equipping the cars, are not material. The evidence falls short of showing a sufficient supply of sound and suitable stakes. It shows only a supply of lumber for the purpose of making stakes. That the stake was among those so prepared would justify

¹Floyd v. Sugden, 134 Mass. 563.

a finding that it was there through the negligence of the men whose duty it was to prepare them, and for that negligence, at least, the defendant was answerable.”¹

5. Servants Whose Duty it is to Repair.

2097. Where a master employs competent servants to make the ordinary repairs upon machinery which the other servants are using to keep it in order from day to day, he has met the full measure of his duty. Those employed to make the repairs and those using the machines are fellow-servants.²

2098. Where a minor, acting as a fireman, was injured by the breaking of a switch-rod, it was held that as it was the work of servants or laborers to keep the road in repair, the negligence complained of was the omissions of fellow-servants. The rule first announced was restated and subsequent cases elsewhere cited to sustain it, to wit: *Hutchison v. Y. & B. R. Co.*, 5 W. H. & G. 343; *Wigmore v. Jay*, 5 W. H. & G. 354; *Seymore v. Maddox*, 16 Ad. & El. (N. S.) 326; *Brown v. Maxwell*, 6 Hill, 592; *Coon v. Railway Co.*, 6 Barb. 231.³

2099. The employees whose duty it was to see that the floor of a building was kept in repair, and of sufficient strength for the purpose of its use, were said to be the fellow-servants of those servants whose duties required them to work thereon.⁴

2100. Those employees who are engaged to make the ordinary repairs on machines, such as tightening a screw holding a button, which in turn holds a movable board upon a carding machine in place, are fellow-servants of one whose duties require him to clean such machine.⁵

¹ McIntyre v. Boston & Maine R. Co., 163 Mass. 189.

⁴ Cooper v. Hamilton Mfg. Co., 14 Allen, 193.

² McGee v. Boston Cordage Co., 139 Mass. 445.

⁵ Smith v. Lowell Mfg. Co., 124 Mass. 114.

³ King v. Boston & Worcester R. Corp., 9 Cush. 112.

2101. Where one whose duty it was to oil a machine, after having done so on the occasion in question, left it in a dangerous condition, whereby injury was caused to the operative of the machine, who was unaware of such condition, it was held that the fault of the workman, who, after oiling the machine, neglected to readjust its cylinders, could not be imputed to the defendant. The oiling of the machine was one of the daily matters, regularly incident to ordinary use, which must be intrusted to servants, and in such cases, if competent servants are selected, their negligence on a single occasion cannot be imputed to the master.¹

See **APPLIANCES, DEFECTS AND REPAIRS; MASSACHUSETTS RULE**, for additional cases, 275 et seq.

6. Statute.

See 288 et seq. for statute and cases decided under it.

Michigan.

1. Rule.

2102. The law may be regarded as settled that a master is not liable to a servant for the neglect of his fellow-servants in doing or omitting to do their portion of the common work. He is only liable where his own personal neglect has directly contributed to the injury, or where he has not used ordinary diligence in employing competent servants.

The reason of the rule appears to be that the master or employer, for whose benefit work is undertaken, cannot be regarded as contracting for anything more than his own personal care and diligence, and if he acts in good faith the servant must run all the risks which may arise from others neglecting their duty. It must always be presumed that a master gives proper directions to his servants. His own interest would usually remove any contrary presumption, and there is no want of equity in requiring a servant to assume these risks. He has equal means of observing and guarding

¹ Bjbjian v. Woonsocket Rubber Co., 164 Mass. 214.

against impending danger with the master, and usually better opportunity.¹

2103. The duty of the selection of servants is one that is personal to the master, and so is the duty of the supervision of the business. If these duties are delegated to a general manager, a foreman or superintendent, such officer, whatever he may be called, must stand in the place of the principal, and the latter must assume the risks of his negligence. The fact that one servant is of a higher grade or in a different line of employment in the common business, however, does not have the effect to change their relation as fellow-servants.

It was held in this case that one who was intrusted with the duty of looking after the condition of a bridge at a mine, in connection with other duties, was a fellow-servant of another employee who was injured by the fall of the bridge, owing to its insecure condition.²

2104. Where an employee was injured by the negligent act of one who, as to his general duties, stands in the relation of vice-principal, though such act is one which pertains to the duty of a servant merely, he will not be denied relief against the common employer on the ground that as to such act the superior was a co-employee. He represents the master as to all he may do, without any reference to the act causing the injury.³

2105. The company is not relieved from responsibility by the fact alone that the injured servant's fellow-servant contributed to the injury.⁴

2. Duties Personal to the Master — Vice-principals.

2106. All who serve the same master, work under the same control, derive authority and compensation from the

¹Michigan Central R. Co. v. Leahey, 10 Mich. 193; Michigan Central R. Co. v. Dolan, 32 Mich. 510; Quincy Mining Co. v. Kitts, 42 Mich. 34.

²Quincy Mining Co. v. Kitts, 42 Mich. 34.

³Shumway v. Walworth & N. Mfg. Co., 98 Mich. 411, 57 N. W. 251.

⁴Hunn v. Mich. Cent. R. Co., 78 Mich. 513, 44 N. W. 502.

same source, and are engaged in the same general business, though it may be in different grades or departments, are fellow-servants. Nor does it make any difference that the offending servant is a servant of superior authority, unless such superior servant arises to the grade of *alter ego* of the principal.

There are certain duties, however, which cannot be delegated to an agent or servant so as to relieve himself of responsibility; among other things, the duty of selecting competent servants, the providing of suitable machinery and appliances, and a safe place to work. Under this head will be included the providing of a safe method of moving trains.¹

2107. Where the train-dispatcher of a railroad company has absolute control of the moving of its trains, and is charged with the duty of directing their movements, he is not a fellow-servant of the employees in charge of the trains, who are bound to obey his directions.²

2108. Where an injury is caused to a workman in a mine by reason of the negligence of one who is not in any true sense a mine foreman or department leader, or sub-chief in a given sphere of mining operations, but whose agency covers the whole mine and the entire control of such work, such negligence is not that of a fellow-servant, but is to be considered as the negligence of the owners of the mine, and they will be held liable whether such agent was appointed by them or by their general agent. This was said in reference to a captain of a mine.³

2109. An assistant road-master in control of a gang of men, clothed with authority and discretion to direct their work and discharge them, is a vice-principal.⁴

2110. Those who are employed to provide and keep in repair the place, and to supply the machinery and tools, are engaged in a different employment from those who are to

¹ *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270.

² *Hunn v. Mich. Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502.

³ *Ryan v. Bagaley*, 50 Mich. 179, 15 N. W. 72.

⁴ *Palmer v. Mich. Cent. R. Co.*, 87 Mich. 281.

use them. This rule was applied to the foreman of a mill whose duty it was to keep the machinery in repair, and whose neglect to repair caused injury to a workman in the mill.¹

2110a. Section-men and operatives of trains are not fellow-servants where one of the latter is injured by reason of the negligence of the former. In respect to keeping the track in repair, section-men are performing duties personal to the master and engaged in making a place of work.²

2111. Where the owner of a building gave an employee full control of its construction and of the men employed thereon, it was held that he was a vice-principal.³

2112. An assistant road-master was held not to be a fellow-servant with employees upon a train,—he was a vice-principal. The company was liable for the consequences to one such servant in obeying an order about his work given by such vice-principal, though it merely related to operation and not to safety of appliances.⁴

2113. An employee who had the superintendence and entire control of the construction of a scaffold or runway used in connection with unloading coal from boats to a bin on the dock was held to represent the master as a vice-principal and was not a fellow-servant of an employee using such runway, who was injured by reason of the use of improper materials in its construction.⁵

2114. Where a mill-yard foreman directed the construction of a ditch in the yard into which an employee, while pushing a car upon a track, fell and was injured, it was held that such foreman, as to such act, was not a fellow-servant, but that what he did in respect to the place where servants were required to do their work was as representative of the master.⁶

¹ Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607, 54 N. W. 492; Sadowski v. Mich. Car Co., 84 Mich. 100.

² Balhoff v. Mich. Cent. R. Co. (Mich.), 65 N. W. 592.

³ Slater v. Chapman, 67 Mich. 523.

⁴ Harrison v. Detroit, L. & N. R. Co., 79 Mich. 409, 44 N. W. 1034.

⁵ Brown v. Gilchrist et al., 80 Mich. 56, 45 N. W. 82.

⁶ Sadowiski v. Mich. Car Co., 84 Mich. 100, 47 N. W. 598.

2115. A car-inspector, whose duty it was to inspect the cars and appliances, as to such duties represents the master, who is responsible for the manner of their performance.¹

2116. It would seem that where a foreman gives an order which it is dangerous to obey, and himself does a careless act in connection therewith, increasing the danger, the master is liable for his acts. This is the only conclusion that can be reached from the brief statement by the court.²

3. Fellow-servants.

2117. The rule which holds employers liable for the negligence of their servants is not extended to cases where the injury is committed by a fellow-servant. In all such cases the master is not liable unless for his own neglect. He is not liable when he has used all ordinary and reasonable precaution to provide for the safety of his servants, and where the mischief occurs in spite of these precautions. It was held that an engineer upon a train, injured by the negligence of a conductor of another train, could not recover; they were fellow-servants.³

2118. A switchman operating in a yard, and a track-man, were held to be fellow-servants where the former was injured by the act of the latter in leaving an iron rail on a side-track. See subsequent cases in conflict with the doctrine of this case.⁴

2119. A fireman and engineer upon the same train are fellow-servants. So held where a fireman was injured through an engineer's neglect to obey signals which he saw, and was bound by the company's rules to observe.⁵

2120. Where a boy seventeen years old, employed as a brakeman, was killed, while operating a switch, by an engine in charge of the fireman running over him, to the sug-

¹ *Morton v. Detroit, B. C. & A. R. Co.*, 81 Mich. 423, 46 N. W. 111.

² *Erickson v. M., L. S. & W. R. Co.*, 83 Mich. 281, 47 N. W. 237.

³ *Michigan Cent. R. Co. v. Dolan*, 83 Mich. 510.

⁴ *Michigan Cent. R. Co. v. Austin*, 40 Mich. 247.

⁵ *Henry v. Lake Shore & M. S. R. Co.*, 49 Mich. 495.

gestion that it was negligence on the part of the fireman to fail to sound the bell and whistle it was said: "If this be conceded, still the fireman was a fellow-servant of the brakeman, for whose negligence toward a fellow-servant the company is not liable."¹

2121. One who worked at odds and ends around a mill-yard of a corporation operating a saw-mill and salt block, and who occasionally loaded salt on a barge for market, was held to be a fellow-servant of other employees working in the warehouse handling barrels, and therefore could not recover for injuries received from a descending elevator, caused by their neglect.²

2122. A laborer in a foundry, who was frequently called upon to assist in running out molds, was held to be a fellow-servant of a laborer who made the molds, where such laborer was injured by reason of the escape of molten metal, due to the use of an imperfect flask in making the molds. This upon the ground that the master had provided plenty that was suitable, and the fault was that of a fellow-servant in making an improper selection.³

2123. Where a blacksmith was injured by a piece breaking from the face of a sledge-hammer used by a fellow-servant, and it appeared there were others at hand that were not faulty which might have been selected, it was held no recovery could be had.⁴

2124. An engineer of one train and the conductor of another train are fellow-servants.⁵

2125. An inspector whose duty it is to inspect all cars received for transportation by a railroad company is a fellow-servant of those whose duty it is to operate the same, and the employer is not liable to one of such servants for his neglect to make proper inspection.⁶

¹ *Greenwald v. Marquette, Houghton & Ontonagon R. Co.*, 49 Mich. 197. ⁴ *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350.

² *Sell v. Rietz Bros. L. Co.*, 70 Mich. 479. ⁵ *Enright v. Toledo, A. A. & N. M. R. Co.*, 93 Mich. 409, 53 N. W. 536.

³ *Kehoe v. Allen et al.*, 92 Mich. 464, 52 N. W. 740. ⁶ *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329, 56 N. W. 756, reviewing prior cases.

· **2126.** Laborers upon the track and operatives upon the trains are fellow-servants, where one of the former is injured by the negligence of the latter.¹

2127. A conductor directing the unloading of a freight-car is a fellow-servant of the brakeman doing the work.²

2128. Where the fireman on one of defendant's passenger trains while in the cab of his engine, and passing a freight train standing on a side-track, was struck and injured by the projecting limb of a tree on a flat-car loaded with trees, and it appeared a rule of defendant required the conductor of the freight train to inspect the flat-car and see that it was properly loaded before receiving it into his train, it was held the fault was that of the conductor of the freight train in failing to see that the car was properly loaded and receiving the car into the train, and recovery was denied.³

2129. It is the established rule in Michigan that employees on freight trains are fellow-servants. Hence, where a brakeman was injured by the negligent manner in which the engineer handled the engine, recovery was denied.⁴

2130. Where an employer furnishes suitable materials and employs competent carpenters to construct the scaffolding to be used by them in putting a cornice upon a building, and the same scaffolding is subsequently used by painters hired to paint the cornice, the carpenters who constructed the scaffolding and the painters are fellow-servants, and the employer is not liable for injuries caused to one of the painters by the breaking of the scaffolding.⁵

2131. The captain and mate of a vessel are fellow-servants where the latter is injured by the negligence of the former.⁶

2132. Where a car-repairer, while at work upon cars upon a track, was injured by the negligence of the foreman in

¹ *Schaible v. L. S. & M. S. R. Co.*, 97 Mich. 318, 56 N. W. 565.

⁴ *Stanley v. Railway Co.*, 101 Mich. 202.

² *La Pierre v. Chicago & G. T. R. Co.*, 99 Mich. 212, 58 N. W. 60.

⁵ *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15.

³ *Jarman v. Railway Co.*, 98 Mich. 135.

⁶ *Caniff v. Blanchard Nav. Co.*, 66 Mich. 638.

failing to place a flag for his protection as required by the rules, and by the negligence of an engineer while handling cars with his engine, in permitting other cars to come back against the one under which plaintiff was engaged at work, thereby causing his injuries, it was held that they were his fellow-servants.¹

2133. Where an experienced carpenter was injured by the breaking of a scaffold-plank on which he was working, and it appeared that the plank was put in place by a fellow-workman by the direction of a mere foreman without controlling power, it was held not error to deny a verdict for the plaintiff.²

2134. Where an employee upon a construction train was injured by the neglect of the engineer and fireman of the train, no recovery could be had from the master, as they are fellow-servants.³

2135. The founder in a blast-furnace having charge of the inside work of the furnace is a fellow-servant of the engineer of the locomotive used by the same company in moving cars upon the premises, though the founder's department and the department in which the engineer works are separate and under charge of different foremen.⁴

2136. The foreman of a section crew is their fellow-servant where one is injured by his neglect to send a look-out ahead near a curve to give warning of an approaching train.⁵

2136a. A section-foreman is a fellow-servant with members of his crew.⁶

2137. An employee whose duty it is to inspect foreign cars is a fellow-servant with operatives.⁷

¹ Peterson v. C. & N. W. R. Co., 67 Mich. 102.

⁵ Hammond v. C. & G. T. R. Co., 88 Mich. 334, 47 N. W. 965.

² Dewey v. Parke, Davis & Co., 76 Mich. 631, 43 N. W. 644.

⁶ Gavigan v. Lake Shore & M. S. R. Co. (Mich.), 67 N. W. 1097.

³ Harrison v. Detroit L. & N. R. Co., 79 Mich. 409, 44 N. W. 1034.

⁷ Dewey v. Detroit, G. H. & M. R. Co., 97 Mich. 329, 52 N. W. 942.

⁴ Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270.

2137a. A shift-boss of miners is a fellow-servant of a trammer in a mine.¹

2138. The action of an engineer on a switch-engine in permitting the engine to be operated under his direction by the fireman, who had only two years' experience at the work, and had been accustomed to handle it, is not such negligence as will permit a fellow-servant to recover for an injury caused by the manner in which the fireman operated it.²

2139. Where an accident resulted either from the falling out of a stake because it was carelessly put in upon a car of a log-train or by the jolting of the train, which was running faster than the rules allowed, the train being wrecked by the falling of a log therefrom, causing injury to a brakeman, it was held that the negligence, if any, was that of fellow-servants or contributed to by them and plaintiff.³

2139a. The foreman of work in one of the rooms of a car-shop who performs manual labor therein with the other men employed and under his charge is their fellow-servant as to all acts other than such as the law imposes personally on the master.⁴

Minnesota.

1. Duties Personal to the Master — Common-law Vice-principal.

2140. It is the duty of the master to use due care in supplying and maintaining suitable instrumentalities for the performance of the work required of the servants. This duty is imposed upon him as the master. It is an absolute and personal duty; that is to say, it is one from the responsibility for the proper discharge of which the master cannot escape by intrusting its performance to a servant or agent. If the master does so intrust it, the servant or agent is charged with the master's duty, and in the case of a corpo-

¹ *Petaja v. Aurora Min. Co.* (Mich.), 64 N. W. 335.

³ *Conger v. Flint & P. M. R. Co.*, 86 Mich. 76, 48 N. W. 695.

² *Thompson v. L. S. & M. S. R. Co.*, 84 Mich. 281, 47 N. W. 584.

⁴ *Findlay v. Russell Wheel & Foundry Co.* (Mich.), 66 N. W. 50.

ration, such servant or agent occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner in which such servant or agent acts. The negligence of such agent or servant in such case is the negligence of the master. In the instance of a railroad, the track is one of the instrumentalities for the working of the road, and therefore something which it is the master's absolute and personal duty to employ due care in maintaining and keeping in a condition suitable to the purpose for which it is to be used, that is to say, in such condition that it can be safely used for such purpose. Hence it was held, where an employee on defendant's wood train was injured through the negligence of a section foreman in taking up a rail of the track to repair without putting out proper signals to warn approaching trains, that the foreman was not, as to such act, the fellow-servant of the injured employee.¹

2141. A car-repairer is not the fellow-servant of a brakeman injured by reason of defects in a car which were not discovered through the neglect of such car-inspector. Even in the case of foreign cars the court refuses to recognize any distinction as to the master's duty between such and those of its own.²

2142. It is incumbent upon a railway corporation, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employees which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to this obligation is the duty of frequent inspection, and the corporation acting by its servants in the discharge of such duty is liable for their negligence; and therefore an employee who had charge of making up trains in the yard, who was injured while attempting to couple a damaged car, which defect a proper inspection would have discovered, was held entitled to recover.³

¹ Drymala v. Thompson et al., 26 Minn. 40.

³ Tierney v. Minn. & St. L. R. Co., 33 Minn. 111.

² Fay v. Minneapolis & St. Louis R. Co., 30 Minn. 231.

2143. Those servants who have entire charge and superintendence of dangerous places and premises and have charge of employees who work thereon stand in the shoes of their principals as respects such places, and in the sending of an employee to such place of danger, so that their negligence is the negligence of their principal.¹

2144. As respects the duty of a railroad corporation to have its cars inspected, so that they may be maintained in a safe condition for use by its servants, the master is not exonerated from liability to a servant for the neglect of its duty upon the ground that its car-inspector and the servant injured by reason of his neglect are fellow-servants.²

2145. The foreman of a section crew was held to be a vice-principal where one of the crew was injured by reason of the defective handle to the car with which they were working, it appearing that it was a part of the duty of the foreman who had the car constantly in charge to see that it was kept in repair and furnished with new handles when necessary.³

2146. Where it appeared that the defendant had in its employ a crew of men whose exclusive work and duty it was to put up loose staging and scaffolding as from time to time it was needed for the use of the workmen engaged in the defendant's general work and business, the presumption arises that a staging found in position at the place where the workman is required to perform his work, and upon which he is obliged to stand to perform it, was built by one or more of the staging crew. The men composing such a crew and the men engaged in defendant's general business are not fellow-servants.⁴

2146a. Where, in constructing a ditch, the work was placed in charge of a foreman, with authority to employ and discharge the men, it was held that he was a vice-princi-

¹ Cook v. St. P., M. & M. R. Co., 34 Minn. 45.

² Macy v. St. Paul & D. R. Co., 35 Minn. 200.

³ Anderson v. Minn. & N. W. R. Co., 39 Minn. 523.

⁴ Sims v. American Steel Barge Co., 56 Minn. 68, 57 N. W. 322.

pal in respect to the act of ordering one of the men to work in a place of unusual danger in the ditch, without giving him proper instruction and warning.¹

2. Fellow-servants.

2147. Where a section-man on defendant's railroad was injured while engaged in raising wrecked cars, as was alleged, by reason of the negligence of the road-master, it was held that they were fellow-servants; that the mere fact that the road-master was superior in authority, or an overseer over the injured employee, did not take the case out of the rule of fellow-servants.²

2148. A track laborer was run over after nightfall by a locomotive furnished with a proper head-light, but which was not lighted. It was held that while failure to provide a head-light would have made the company liable, it was not liable to the person injured for the failure to light the one provided, the neglect being that of his fellow-servant.³

2149. The plaintiff with other servants was employed to assist in handling and removing cars in the yard of the defendant, including also as a part of his duty the removal of damaged or broken cars to the proper place for repairs, under the direction of the foreman, who was subject to the orders of the yard-master and division superintendent. It was held that as respects the risks arising from the acts and omissions of such foreman in the course of such employment he was to be deemed the fellow-servant of the plaintiff.⁴

2150. In the absence of controlling evidence to the contrary, an ordinary railway station-agent is presumed to have general charge of the tracks in and about his station, and as respects such charge he is the fellow-servant of an engineer engaged in running a locomotive upon any of such tracks, and hence the common master of the two is not responsible

¹Carlson v. Northwestern Tel. Exch. Co. (Minn.), 65 N. W. 914.

³Collins v. St. Paul & Sioux City R. Co., 30 Minn. 31.

²Brown v. Winona & St. P. R. Co., 27 Minn. 162.

⁴Fraker v. St. Paul, M. & M. R. Co., 32 Minn. 54.

to the engineer for injury which he may receive in consequence of the negligence of the station-agent as respects the charge of such tracks.

The facts were that the engineer, without fault on his part, ran his engine into some box-cars standing upon the main track at the station. The cars had been placed there by persons not in its employ for their own convenience and without other authority than the assent of the station-agent.¹

2151. A baggage-master on a passenger train and a switch-tender are fellow-servants within the rule exempting the master from liability for an injury resulting to one servant from the negligence of another engaged in the common service, their duties relating alike to the management and operation of trains.²

2152. A foreman at a round-house of a railroad company is the fellow-servant of an employee working under him.³

2153. Section or track men and the engineer and brakemen upon trains are fellow-servants, where the former are injured by the negligence of the latter.⁴

2154. The foreman of a gang of section or track men, engaged in the discharge of his ordinary duties in the course of his employment, is a fellow-servant with them.⁵

2154a. An employee engaged in repairing the track of an electric street railway company is the fellow-servant of a motorman on one of its cars.⁶

2155. Plaintiff was employed by a city as a laborer in excavating a trench in the earth for the laying of water pipes. Upon other laborers in the same employment, and working in connection with plaintiff, devolved the duty of putting in the wooden curbing as the work of excavating progressed, and as the laborers saw the need of it to prevent the earth

¹ *Brown v. Minn. & St. L. R. Co.*, 31 Minn. 553.

² *Roberts v. C., St. P., M. & O. R. Co.*, 33 Minn. 218.

³ *Gonsior v. Minn. & St. L. R. Co.*, 36 Minn. 385.

⁴ *Connelly v. Minn. E. R. Co.*, 38 Minn. 80.

⁵ *Olson v. St. P., M. & M. R. Co.*, 38 Minn. 117.

⁶ *Lundquist v. Duluth St. Ry. Co.* (Minn.), 67 N. W. 1006.

falling into the trench. It was held that such laborers were fellow-servants with the plaintiff, for whose negligence in putting in the curbing the city was not responsible.¹

2156. The defendant, a manufacturer of lumber, had a mill in which lumber was sawed, and from which it was taken and piled in the adjoining yard; it employed in this yard a crew of men, part of whom were engaged in piling the lumber, while others were engaged in measuring, sorting and scaling it. Plaintiff, who was one of this crew, was engaged in the sorting and scaling and had nothing to do with the piling. In accordance with the usual custom in piling lumber, boards were projected from the piles at certain intervals as steps on which to ascend and descend. The lumber contained sufficient sound and suitable boards for steps, and the men employed as pilers were competent men to perform that work. In making one of these piles the pilers negligently projected as a step an unsound and unsafe board, and consequently the plaintiff, while ascending the pile in the line of his duty, stepped on this board, which broke, causing him to fall, whereby he sustained personal injuries. It was held that the plaintiff and those who piled the lumber were fellow-servants, and therefore defendant was not liable.²

2157. Where the general work in which the several servants are engaged includes the construction and operation of the appliances with which they are to work, as where they are engaged in erecting a building and they construct the scaffold on which they are to stand in doing the work, they are to be deemed fellow-servants as well in respect to the negligence of one of them in constructing such appliances as in respect to negligence in doing any other of their work.³

2158. The master is not responsible to a servant for the act of a fellow-servant in negligently selecting a defective

¹ *Bergquist v. City of Minneapolis*, 42 Minn. 471.

³ *Marsh v. Herman et al.*, 47 Minn. 537.

² *Fraser v. Red River Lumber Co.*, 45 Minn. 235.

instrument, for instance, an iron hook to which to attach a pulley to raise a heavy weight in a boiler shop, that being proper detail of the work in which the servants are engaged; and the mere fact that it was the foreman that made the improper selection is immaterial.¹

2159. The plaintiff, a servant of a third party, was engaged under direction of the servant of the defendant in blasting rock. The two men pursued a method of drawing from the rock the unexploded charge of powder. The method proved to be dangerous, and the two men worked together in this operation. Such servant of the defendant in participating with the plaintiff in the work of removing the unexploded charge of powder occupied the legal relation of fellow-servant with the plaintiff.²

2160. Defendants were engaged in grading a line of railroad. The work was done by cutting down one part, and with the material making a fill in another part adjacent. The material was conveyed from the cut to the fill in dirt cars. In the dump these cars were run on tracks laid on a temporary trestle, constructed with materials (sufficient in quantity) furnished on the grounds by the defendants, and as the dump was filled this trestle was from time to time extended. Part of the men worked in the cut, others drove the teams which drew the cars, others unloaded the cars and shoveled on the dump, and another one (Johnson) framed the bents and built the trestle, but all were subject to be called, on the orders of the foreman, from one part of the work to another. A foreman, one Murdock, was in charge of the work, and gave all the orders to the men, where to work and what to do. He also hired and discharged men on the work. On the occasion in question, it being desired to raise additional bents and lengthen the trestle, the foreman called upon plaintiff and one Peterson to assist Johnson. While plaintiff, Peterson and the foreman were on the trestle, attempting to shove out two

¹ *Ling v. St. Paul, M. & M. R. Co.*,
50 Minn. 160.

² *Corneilson v. Eastern R. Co. of Minn.*, 50 Minn. 23, 52 N. W. 224.

stringers to reach the new bent, the trestle fell and plaintiff was injured. It was held that all those engaged in the different departments of this work (including the construction of the trestle) were fellow-servants; that the trestle was not a structure furnished by the defendants for their employees to work on, but was itself a part of the construction of the road, and a part of the work which they themselves were employed to perform. In the matter of building the trestle the foreman was a fellow-servant with the workmen under him. It is not the rank of an employee, or his authority over other employees, but the nature of the duty or service he performs, which determines whether he is a vice-principal or a fellow-servant. Whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which the duty is performed, and to the extent of the discharge of that duty the agent stands in the place of the master; but as to all other matters he is a mere co-servant with other employees.¹

3. Statute of 1887.

Chapter 13, Laws of 1887.

2161. Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained in this state, and no contract, rule or regulation between such corporation and any agent or servant shall impair or diminish such liability. *Provided*, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employee, agent or servant while engaged in the construction of any road or any part thereof not open to public travel or use.

2162. Chapter 13, General Laws of 1887, making railroad companies liable to an employee for injuries caused by the

¹ *Lindvall v. Woods et al.*, 41 Minn. 212, 42 N. W. 1020.

negligence of a co-employee, applies only to those employees engaged in operating a railroad and so exposed to the peculiar dangers attending the business.¹

2163. A crew of men, of which plaintiff was one, was engaged in repairing a bridge on defendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew the draw was left unfastened and was blown shut by the wind, and injured the plaintiff while at work between the stationary part of the bridge and the draw. It was held that the statute had no application, and the defendant was not liable.²

2164. A crew of section-men, of which plaintiff was one, was engaged in loading railroad iron from the ground upon a flat-car, when one of the crew negligently let one of the rails fall upon plaintiff's arm. It was held that the injury was not the result of any danger peculiar to or directly connected with the use and operation of the railroad, and hence not within the provisions of the statute.³

2165. The statute was considered as applicable with respect to the alleged negligence of a locomotive engineer in operating his engine, resulting in injury to a section-hand at work on the road.⁴

2166. The statute was held to be applicable to a railroad section-hand whose duties required the use of a hand-car, and who was injured through the negligence of a fellow-servant in operating it.⁵

2167. The defendant had operated its line of railroad from Chicago to St. Paul about six months when plaintiff was injured by the negligence of a co-employee in operating an engine in hauling cars on a temporary track for the purpose of filling in low lands of the yard at St. Paul. It was held not within the proviso of section 1, chapter 13, Laws of

¹ Lavalley v. St. P., M. & M. R. Co., 40 Minn. 249.

² Johnson v. St. Paul & D. R. Co., 43 Minn. 222.

³ Pearson v. C., M. & St. P. R. Co., 47 Minn. 9.

⁴ Smith v. St. Paul & D. R. Co., 44 Minn. 17, 46 N. W. 149.

⁵ Steffenson v. C., M. & St. P. R. Co., 45 Minn. 355.

1887, exempting a new railroad or part thereof not open to public travel or use from liability to an employee for damages sustained through the negligence of a co-employee. The work was not the construction of any road or part thereof.¹

2168. A railroad company operating a line composed of the lines or tracks of several different companies comes within the provisions of the statute. Work done in constructing a yard with tracks in it to be used in connection with and as part of the line of railroad already open to the public does not come within the proviso of the statute.²

2169. A section foreman on a hand-car was informed by the crew that a train was approaching from behind, but he ordered the men to keep on pumping until he told them to stop. He delayed giving the order until the train was so close that the car could not be removed from the track in the accustomed deliberate and safe manner, and in the haste and excitement in getting it out of the way one of the crew stumbled and lost his hold, by which the car was precipitated upon another of the crew. It was held that, under the statute, the fact that the negligence complained of was that of a fellow-servant constituted no defense. It was further held that the question whether the injury was due to the negligence of the foreman was properly for the jury.³

2170. The statute held to apply to the act of a foreman of a section crew in not having stopped and taken the hand-car off the track when he knew that a train was following, whereby a section-hand under such foreman was injured by a freight train coming in collision with such hand-car.⁴

2171. Where an employee of the defendant railroad company, who was a wiper of engines in defendant's round-house, was called by the foreman to assist in straightening a wire cable used to pull a plow in unloading gravel, and

¹Schneider v. C., B. & N. R. Co.,
42 Minn. 68, 43 N. W. 783.

²Moran v. Eastern R. Co. of
Minn., 48 Minn. 46.

³Northern Pac. R. Co. v. Behling,
57 Fed. 1037.

⁴Slette v. Great Northern R. Co.,
53 Minn. 341, 55 N. W. 137.

he was injured by another employee pulling it from the end of a tie where it had become taut, and when loosened it swung against the plaintiff's leg with great force, breaking it, it was held that he was injured by reason of exposure to hazards peculiar to the repair and operation of railroads within the statute of 1887. It was said: "If there is any element of hazard or condition of danger which contributed to the injury and which is peculiar to the 'railroad business,' the statute applies."¹

2171a. A car-cleaner, injured while working inside of a coach located on a side-track, caused by another coach being forced against it, is exposed to the hazards of railroading within the meaning of the statute.²

4. Statute of 1894.

2172. SEC. 2701. "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by an agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part, when sustained within this state, and no contract, rule or regulation between such corporation and any agent or servant shall impair or diminish such liability."

2173. Where the wiper of engines in the defendant's round-house was injured while assisting in coaling an engine by its being negligently moved, as he claimed, by a co-employee, it was held that he was injured by reason of exposure to hazards peculiar to the operation of railroads within the statute of 1894. It was further held that the act applied to receivers.³

2174. One employed by a railroad company in its stock-yards was injured, whose duty was to step from a high platform to the top of cars as they came opposite him and

¹Nichols v. C., M. & St. P. R. Co.,
60 Minn. 319, 62 N. W. 386.

³Mikkelson v. Truesdale (Minn.),
65 N. W. 260.

²Mitchell v. Northern Pacific R.
Co., 70 Fed. 15.

pull bundles of hay on them from the platform, and was injured through obeying the orders of the conductor in charge of the loading, in stepping from the platform when the cars were moving at a too rapid rate of speed to do the act with safety, he being inexperienced and the night dark. It was held that he was injured through exposure to hazards of railroading, within the statute of 1894.¹

Mississippi.

1. Rule.

2174a. The answer to the question, "Who are fellow-servants?" was "Those who are co-working in the same enterprise under the same master and compensated by him. Differences in wages or work do not affect the question; the general business is the same. The conductor, engineer, brakeman and fireman are fellow-servants with the same employees on every other train. So they are with the switch-tenders. The track-repairers or watcher of trains to give signals is in a common employment with the engineer, conductor and fireman of a train."²

2175. The master is not liable for injuries which may happen to a servant in his employment, unless the master is culpable, that is, chargeable with negligence or carelessness either in respect to the act that caused the injury, or in the employment of the person who caused it, or keeping him in service after notice of his unfitness, or after with the use of proper diligence he ought to have known of it.

The facts were that an engineer was injured by the alleged defective condition of the track. In speaking with reference to the duty of the corporation and the relation of the servants who are employed to keep the track in repair it was said: The corporation will have done all that could be reasonably be required of it when it exercised circumspection and prudence in appointing employees to observe the road,

¹ *Leier v. Minn. Belt Line Co.* (Minn.), 65 N. W. 269.

² *N. O., J. & G. N. R. Co. v. Hughes*, 49 Miss. 258.

make the repairs, and when it put at their disposal suitable materials for the work, and when it caused suitable supervision to be made over these local employees.¹

2. Fellow-servants.

2176. The element of co-operation, and individual and personal exercise, for the accomplishment of one common end has been the controlling element in determining the question of fellow-servants in this state. In addition to the general definition as to who are fellow-servants, it was stated "that all employees of the common master, engaged in the merely productive service connected with the carrying on of the business of running trains, are fellow-servants."

It was said, thus the definition was made and the test stated by which nearly every case involving the doctrine that has ever been held in this court was readily determined; that the definition and the test were so clear and simple as to make nine-tenths of all the cases constantly occurring in railroad life and service practicably self-determining.

The facts were that a section-hand was injured while holding a bent fish-bar which the section-master was striking with a view of straightening and fitting it for its proposed use. It was held that, both being engaged at the time in doing ordinary labor, they were fellow-servants.²

2177. It was held that a railroad company was not liable for an injury to its brakeman caused by want of sufficient sand in the sand-box of the engine, if the insufficiency was due to the failure of that servant whose duty it was to fill the sand-boxes suitable for trains to start, as they were fellow-servants. The rule was stated as being conclusively settled that all employees of a railroad company engaged in a merely productive service connected with the carrying on of the business of running of trains are fellow-servants, and

¹ *Howd v. Mississippi Central R. Co.*, 50 Miss. 178.

² *La Grone v. Mobile & O. R. Co.*, 67 Miss. 592, 7 So. 432.

that the common employer is not responsible to one of these for injuries caused by the negligence of another.¹

2178. It was held that the brakeman of one train of a railroad company was the fellow-servant of the employees in charge of and operating another train of the same company, and could not recover for injuries caused by the negligence of the employees operating such train. The court repudiated the separate-department theory which seems to prevail in some other states.²

2179. It was held that one working as a fireman on a locomotive with the permission of the railroad company, for the purpose of learning the business, was a fellow-servant of the train-dispatcher employed by such company, where the fireman was injured by reason of the negligence of the latter.³

3. Statute.

Code of 1892, section 3559.

2180. Every employee of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work.

Knowledge of an employee injured by the defective or unsafe character or condition of machinery, ways or appliances shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by

¹ Louisville, N. O. & T. R. Co. v. Petty, 67 Miss. 255, 7 So. 351. ³ Millsaps v. Louisville, W. & T. R. Co., 69 Miss. 423, 13 So. 696.

² McMaster v. Ill. Cent. R. Co., 65 Miss. 264, 4 So. 59.

them. Where death ensues from an injury to an employee, the legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employee to waive the benefit of this section, shall be null and void; and this section shall not deprive an employee of a railroad corporation, or his legal or personal representative, of any right or remedy that he now has by law.

4. Constitution.

2181. The constitution of 1890, section 193, provides that "every employee of a railroad corporation shall have the same rights and remedies for any injury suffered by him from the act or omission of said corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the service of the party injured."

2182. The question in this case was whether, where a brakeman was injured by the negligence of an engineer who had signaled for brakes, and while they were being applied caused a movement of the train without proper warning, such engineer was the superior agent or officer under the constitutional provisions of 1890. It was held that he was not.¹

2183. It was held that a fireman on an engine and a telegraph operator were engaged in different departments, or about a different piece of work, within the meaning of the constitution.²

Missouri.

1. Rule.

2184. A servant who is injured by the negligence or misconduct of his fellow-servant can maintain no action against

¹ *Evans v. Louisville, N. O. & T. R. Co.*, 70 Miss. 527, 12 So. 581.

² *Illinois Central R. Co. v. Hunter et al.*, 70 Miss. 471, 12 So. 482.

the master for such injury, unless the servant by whose negligence the injury is occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master.

This rule applied where a brakeman upon a train was injured by the train going through a trestle which was too frail and weak to withstand the weight and strain. Thus it appears that at the date of the ruling (1860) no distinction was recognized between those servants whose duties were in connection with the ways and appliances and those engaged in the use and operation of them.

The court also refused to recognize the distinction so strictly adhered to in Ohio, exempting from the operation of the rule servants who are employed in a subordinate capacity and strictly subject to the orders of their superiors.¹

2185. It was held that General Statutes of 1865, chapter 63, which requires a bell to be placed upon each locomotive engine, and that it be rung at a distance of at least eighty rods from any public road or street, and making the corporation liable for all damages which shall be sustained by any *person* by reason of such neglect, did not apply to railroad employees.²

2186. It was held, however, that under the Revised Code of 1855, page 647, which provides that "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent or servant or employee whilst running, conducting or managing any locomotive, car or train of cars, etc., . . . shall forfeit and pay for every person or passenger so dying, etc., . . ." that the representative of a servant can maintain an action against the master if the death be occasioned by the negligence or criminal intent of a fellow-servant.³

¹ McDermott v. Pacific R. Co., 30 Mo. 115; Rohback v. Pacific R. Co., 43 Mo. 187.

² Rohback v. Pacific R. Co., 43 Mo. 187.

³ Schultz v. Pacific R. Co., 36 Mo. 13.

2187. This construction of the statute was adhered to by a divided court in *Connor v. Railway Co.*, 59 Mo. 285. Subsequently in *Proctor v. Railway Co.*, 64 Mo. 112, the court overruled the foregoing cases and held that the word "person" had no application to and did not include fellow-servants. The latter case was approved in *Elliott v. Railway Co.*, 68 Mo. 272.

2188. Where injuries to servants or workmen happen through the negligence or misfeasance or misconduct of a fellow-servant, no action therefor can be maintained against the master, unless the fellow-servant is not possessed of ordinary skill and capacity in the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master. But where such injuries are owing to improper or defective machinery or appliances used in the prosecution of the work, the condition of which by reasonable and ordinary care and prudence the master might know, and not to lack of care and prudence in the employees, the rule is otherwise, and the master would be liable. The legal implication is that the employer will adopt suitable instruments and means with which to carry on the business. If he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible.

The defect in question was that of the manner of construction of a coupling appliance upon cars.¹

2189. In actions for damages arising from the negligence of a person whose relation to the plaintiff depends upon facts which are undisputed, the question whether or not such person was a fellow-servant of the plaintiff is a question of law for the court. If the facts are disputed, the law governing those relations should be declared upon alternatives presented by the testimony.²

¹ *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Harper v. Ind. & St. L. R. Co.*, 47 Mo. 567. ² *Marshall v. Schricker et al.*, 63 Mo. 308.

2190. The plaintiff, an engineer who it was alleged was injured through the negligence of a train-dispatcher, having failed to offer evidence as to the latter's duties, it was held that *prima facie*, in the absence of proof, they were fellow-servants, and the burden being upon the plaintiff to show that they were not, he was properly nonsuited.¹

2191. In an action by a servant for damages occasioned by the incapacity and carelessness of a vice-principal, the master is liable whether he knew of such incompetency or carelessness or not, provided they were unknown to the person so injured.²

2. Duties Personal to the Master — Vice-principals.

2192. Where the master delegates to a superintendent the power to employ and discharge servants and to provide and remove materials, which duties adhere to him as master, he thereby makes himself liable for any injuries sustained by his servants caused by the lack of care or negligence of such superintendent. The ruling goes only to the extent that such superintending officer represents the master in his duties relating to the selection of materials. While in the same connection the subordinate position of the servant is referred to, yet it is not declared that a servant exercising control is upon that ground alone a representative of the master.³

2193. Where the servant of a railroad corporation is injured by defects in the machinery or track of the company, the latter cannot defend on the plea that such defects resulted from the negligence of fellow-servants. The agents of the road charged with the duty of supplying a safe track and sound machinery are not properly fellow-servants, but represent the corporation itself. Hence, it was held where an employee was injured, caused by an excavation adjoining

¹ Blessing v. St. Louis, K. C. & N. R. Co., 77 Mo. 410.

³ Brothers v. Cartter et al., 52 Mo. 372.

² McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285.

the track of the defendant company, that it was the duty of the section foreman to keep the track in repair and see that everything appertaining thereto was safe; that *quoad hoc* he was the company; that notice to him was notice to the company, and his negligence was the negligence of the company.¹

2194. Where injury results from the orders of a superintendent appointed by the company, and having entire supervision and control over the work, and power to employ, direct and discharge the laborers, the rule does not apply. Such superintendent is not a fellow-servant, but the agent of the company, and his acts are the acts of his principals. And this is true although the superintendent engages in the same work with the laborers.

The act complained of was that of ordering a fire to be applied in a manner certain to produce an explosion of one of the hot ovens or furnaces in defendant's works.²

2195. A superintendent placed in charge of work is not a fellow-servant with the employees, but the agent of the master and a vice-principal. It was said: Where, through defects in the construction of a scaffold built by a superintendent of all the work or under his directions, and necessary for the work in which he was engaged, an employee receives a fall and injury, and the superintendent was negligent in preparing the scaffold, and the servant exercised proper care, the master will be liable.³

2196. A yard-master who has authority to employ and discharge hands, in the work of making up trains is a vice-principal, and his neglect or failure to furnish hands, where one of the crew is taken sick, to work in his place, where the full number is required for the safe and proper discharge of the work, is chargeable to the master.⁴

¹ Lewis v. St. Louis & I. M. R. Co., 59 Mo. 495; Hall v. Missouri Pac. R. Co., 74 Mo. 298.

³ Whalen v. Centenary Church, 62 Mo. 326.

⁴ Stoddard v. St. Louis, K. C. &

² Gormley v. Vulcan Iron Works, N. R. Co., 65 Mo. 514.
61 Mo. 492.

2197. A car-inspector is not a fellow-servant of a brakeman on a train.¹

2198. Where a master appoints an agent with a superintending control over the work, and with power to employ and discharge hands and direct and control their movements in and about the work, the agent in respect to such matters stands in the place of the master. This rule was applied where a foreman over a gang of men engaged in ballasting the track told one of the men, while a train was approaching and near at hand, that he had better be getting two small stones off the track, and the employee in doing so was struck by the engine and injured. A recovery was sustained.²

2199. Knowledge of defects on the part of the agents of the employer who are intrusted with the duty of procuring machinery and keeping the same in repair is to be attributed to the employer, but not to those who have no duty to perform in respect thereto. This was said where an employee using a hand-car was injured by the breaking of a handle thereto, caused by its being made of brittle wood, and there was evidence from which it could be inferred that those who contrived it ought to have known the condition of the wood.³

2200. The foreman of a gang of laborers in directing them to remove a hand-car off the track in front of an approaching train was doing an act in his capacity of vice-principal, for which the master is responsible.⁴

2201. Where a road-master having general superintendence of its tracks, while engaged in superintending and directing the removal of a wrecked train, but not in the manual labor of removing a wreck, gave a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal was injured, it

¹Condon v. Missouri Pac. R. Co.,
78 Mo. 567.

²Stephens v. Hannibal & St. J.
R. Co., 86 Mo. 221.

³Covey v. Hannibal & St. J. R.
Co., 86 Mo. 635.

⁴McDermott v. Hannibal & St. J.
R. Co., 87 Mo. 285.

was held the defendant was liable therefor. The road-master was not a fellow-servant of the one injured, but represented the company therein as vice-principal or *alter ego*, and his negligence in the matter causing the injury was that of the company.¹

2202. A train-dispatcher of a railroad who has the control of the movements of trains, and to whose orders the conductors and engineers are subject, is the representative of the company, and is not a fellow-servant with those engaged in operating and moving trains.²

2203. A railroad engineer and track-repairer were held not to be fellow-servants, where the latter was injured.³

2204. So it was held that train employees and track-repairers were not fellow-servants, where one of the latter was injured.⁴

2205. So it was held that an employee whose duty it was to assist in the operating of a rock crusher, injured in the attempt to remove a cable from the track by being run over by a train, was not a fellow-servant of the men operating the train.⁵

2206. Where defendant furnished for his employees a temporary bridge for the passage of construction trains, and the construction of a permanent bridge therefrom, the fact that the bridge was built under a competent foreman, and competent inspectors were afterwards furnished, was held not to free defendant from liability to such employees for defects in the construction and repair of such bridge of which the defendant could in the exercise of ordinary care have known. This ruling was placed upon the ground that such temporary bridge was a structure in and of itself, and distinguished it from a staging, which it is held is a part of the work which the employees are engaged to perform.⁶

¹ Hoke v. St. Louis, K. & N. R. Co., 88 Mo. 360.

² Smith v. Wabash, St. L. & P. R. Co., 92 Mo. 359.

³ Schlereth v. Missouri Pac. R. Co., 115 Mo. 87.

⁴ Swadley v. Missouri Pac. R. Co., 118 Mo. 268.

⁵ Church v. Chicago & Alton R. Co., 119 Mo. 203.

⁶ Bowen v. Chicago, B. & K. C. R. Co., 95 Mo. 268, 8 S. W. 230.

2207. The engineer and fireman in charge of a passenger train are not fellow-servants of a section-hand, where the latter is injured. This ruling is placed upon the ground that the engineer and fireman and section-hand are engaged in different departments of the general business in which the defendant was engaged.¹

2208. A section-foreman is a vice-principal as to a man under him in respect to work within the scope of his employment.²

2209. Where one employee is in charge of a certain part of the railway business, in this case of a round-house, the engines there, and the men necessary to care for them, he must not be regarded as the fellow-servant of an employee working at the time under his orders in respect of acts done by the former in pursuance of his authority over a branch of business under his charge.³

2210. A laborer working in defendant's quarry under the direction of a foreman, having no connection with the train service, was held not a fellow-servant of employees operating a passenger train in defendant's yard. They were engaged in different branches of defendant's business.⁴

2211. A track-laborer and a locomotive engineer are not fellow-servants. They are not engaged in the same department of the master's business.⁵

2212. A conductor of a material-train having control of it and its management, and the foreman over a gang of men having power to direct them what to do and when to do it, are not fellow-servants of the men composing such gang. Where the master gives to a person the power to superintend, control and direct the men engaged in the performance of work, such person is, as to the men under him,

¹Sullivan v. Mo. Pac. R. Co., 97 Mo. 113, 10 S. W. 852.

²Sherrin et al. v. St. Jos. & St. L. R. Co., 103 Mo. 378, 15 S. W. 442.

³Dayharsh v. Hannibal & St. J. R. Co., 103 Mo. 570, 15 S. W. 554.

⁴Dixon v. Chicago & A. R. Co., 109 Mo. 413, 19 S. W. 412.

⁵Schlereth v. Mo. Pac. R. Co., 115 Mo. 87.

a vice-principal, and it can make no difference whether he is called a superintendent, conductor, boss or foreman; for his negligent acts or omissions in the performance of the master's duty, the master is liable.

2213. The foreman or other representative of the master may occupy a dual position, that is to say, he may at the same time be a fellow-servant and an agent or representative of the master. There are certain duties which are personal to the master, and for their non-performance of the work he is liable to the servant. These duties may be delegated to a foreman or even to a servant, and the master is still liable for their non-performance.¹

2214. A switchman under orders of the yard-master and foreman is not the fellow-servant of the latter in respect of acts done by them in the exercise of their authority as such.²

2215. Where a section-foreman, under whom plaintiff was employed, directed a water keg to be placed on the front end of the car for his seat, and while the car was in motion got up and allowed the keg to fall off, thus causing the car to leave the track and injure plaintiff, it was held that as to such act the foreman was a vice-principal, performing duties devolving upon him as the foreman.³

2216. A railroad track-laborer and a locomotive engineer in the employ of the same company are not fellow-servants.⁴

2217. A train-dispatcher having control of trains on a railroad in the performance of duties as such is the representative of the company, and for an accident occurring through his negligence to another employee, subordinate to him and subject to his orders, the company is liable.⁵

2218. A wrecking train was under the general charge of a conductor, but the wreck-master had control of the work-

¹ *Miller v. Mo. Pac. R. Co.*, 109 Mo. 350, 19 S. W. 58. *v. Hannibal & St. Jos. R. Co.*, 96 Mo. 207, 9 S. W. 589.

² *Taylor v. Mo. Pac. R. Co. (Mo.)*, 16 S. W. 206. ⁴ *Schlereth v. Mo. Pac. R. Co.*, 115 Mo. 87, 21 S. W. 1110, affirming

³ *Russ v. Wabash & W. R. Co.*, 112 Mo. 45, 20 S. W. 472; *Stephens* Same Case, 19 S. W. 1134.

⁵ *Smith v. Wabash, St. L. & P. R. Co.*, 92 Mo. 359, 4 S. W. 129.

men, and it was claimed ordered the derrick car to be coupled with a rope instead of a chain, and an employee thereon and plaintiff to execute the order. It was held that the wreck-master was the agent of defendant, and that the performance of the order as given did not make his act any less the act of the principal.¹

2219. A foreman in charge of laborers in removing the refuse of a railroad company's building is vice-principal of the company, and not a fellow-servant of the laborers.²

2220. It is part of the personal duty of the master to give direction to the work he undertakes and to prescribe a system for conducting it. This may be done by rules when necessary, or by personal guidance of managers or foremen. And in so doing the manager must use ordinary care for the safety of his employees. The foreman is not the fellow-servant of the men under his orders in respect to his performance of the master's duty of directing the work in his charge.

While a section gang under a foreman were under way to work on a hand-car, upon seeing a passenger train approaching, such crew, under lead of the foreman, attempted to get the car off the track, and seeing there was not sufficient time the foreman ordered the men to get out of the way, and the hand-car being struck by the engine was thrown off, injuring one of the crew. It was held that the question of the negligent direction by the foreman, and of contributory negligence of the plaintiff, were for the jury.³

2221. Where, through the failure of a railroad company to erect and maintain sufficient fences as required by the statute of Missouri of 1889, section 2611, an animal comes on the track, causing the derailment of a train, injuring an employee thereon, the defense that the insufficiency of the fences was caused by the negligence of a fellow-servant is

¹ *Tabler v. Hannibal & St. J. R. Co.*, 93 Mo. 79, 15 S. W. 810.

³ *Schroeder v. Chicago & A. R. Co.*, 108 Mo. 322, 18 S. W. 1094.

² *Sullivan v. Hannibal & St. J. R. Co.*, 107 Mo. 66, 17 S. W. 748.

not available, since the duty of fencing is cast by the statute upon the company itself; it cannot be delegated by it to its servants.¹

3. Fellow-servants.

2222. *Prima facie* all employees on a train of cars, including conductors, are fellow-servants. Whether so or not is a question not only of law, but depending on the facts, and the burden is on him who seeks to show that the relation does not exist.²

2223. Where an employee upon a train was injured by the giving way of a hoisting apparatus used in connection with the train, it appeared that such employee had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was all right, and so was injured. There was no proof that the conductor had the superintendence or control of the men or power to provide or replace machinery. It was held that the conductor was *quoad* the casualty a fellow-servant merely and not a vice-principal, and his assurance to the plaintiff and representation that there was no danger would not bind the company and render it responsible. But contrawise, where the facts show that he represented the company in the premises, such assurance would amount to a guaranty on its part and would bind it for any resulting damages. And so notice to him of danger would affect the corporation if he acted in that capacity and not otherwise.³

2224. Foremen of gangs of bridge-carpenters were held to be fellow-servants of employees working under their direction.⁴

2225. In an action for damages by a servant against his employer for personal injuries, the employer cannot be charged with negligence as that of himself of one who was

¹ Atchison, T. & S. F. R. Co. v. Reesman, 60 Fed. 370.

³ McGowan v. St. Louis & I. M. R. Co., 61 Mo. 528.

² McGowan v. St. Louis & I. M. R. Co., 61 Mo. 528; Blessing v. St. Louis, K. C. & N. R. Co., 77 Mo. 410.

⁴ Lee v. Detroit Bridge & Iron Works, 62 Mo. 565.

merely a foreman over the plaintiff, who was not engaged in a distinct department of the service, but in the same work with plaintiff, and was not charged with any executive duties or control over plaintiff which could constitute him the agent of the employer. Such person would be simply a fellow-servant, and his position as a mere foreman would not alter the case.¹

2226. To constitute a servant of a railroad company a vice-principal so as to hold the company liable for his negligence towards another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen.²

2227. They are fellow-servants who, under the direction and management of the master himself or of some servant placed by the master over them, are engaged in prosecuting the same common work, without any dependence upon or relation to each other except as co-laborers without rank. Whether the foreman has or has not authority to employ and discharge hands does not determine the relation.

The facts were that a foreman in charge of a gang of car-repairers ordered one of the gang to repair a car upon the track and promised to protect him while at work. He failed in doing so. It was held as to such act he was not a fellow-servant, but a vice-principal, even though there existed a rule which required car-repairers to protect themselves by means of flags.

The court state that a person may occupy a dual relation—that of a fellow-servant when performing manual labor of a servant, though he be intrusted with superintendence, which when exercising he is a vice-principal.

It was further said: "He is a vice-principal who is intrusted by the master with power to superintend, direct or control the workman in his work."³

¹ *Marshall v. Schricker et al.*, 63 Mo. 308.

³ *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588.

² *Rains v. St. Louis, I. M. & S. R. Co.*, 71 Mo. 164.

2228. In an action for personal injuries it appeared that the defendant and his superintendent had directed the unloading of a mill from a wagon near the railroad. The driver left the horses without unhitching the traces or blocking the wheels, and while plaintiff and his co-laborers were unloading the mill it fell on plaintiff's foot by reason of the fright of the horses at a passing train. It was held that the risk was not so extraordinary as to render it the duty of the defendant to see that the wheels were blocked or the horses guarded, and that, as the danger might have been foreseen, the injury was the result solely of the want of care on the part of plaintiff and his fellow-servants.

It was contended on the part of the plaintiff that the facts brought the case within the rule "that it is the duty of the master to use reasonable and ordinary care in guarding a servant against extraordinary perils not incident to the employment," which duty is personal to the master.¹

2229. One employed by a cable-car company to watch at a curve in the track to signal trains to stop or to give notice so that they would not meet at the curve is the fellow-servant with the gripman of a motor-car so as to exempt the company from liability for the death of a watchman caused by the negligence of a gripman.²

2230. Two foreman working independently of each other, but under the same road-master, are fellow-servants, and where a collision between their hand-cars is caused by the negligence of one, resulting in the injury of the other, the railroad company is not liable, though as to the men under him the negligent foreman is a vice-principal when engaged at the time of the accident in keeping the track in repair.³

2231. Railroad section-hands engaged in ballasting a railroad track with stone, which is hauled to them by a construction train, are in a common employment, and are fellow-servants with the train-men.⁴

¹ *Steffen v. Mayer et al.*, 96 Mo. 420, 9 S. W. 630.

² *Murray v. St. Louis, C. & W. R. Co.*, 98 Mo. 573, 12 S. W. 253.

³ *Sherrin et al. v. St. Jos. & St. L. R. Co.*, 103 Mo. 378, 15 S. W. 442.

⁴ *Parker v. Hannibal & St. Jos. R. Co.*, 109 Mo. 362, 19 S. W. 1119.

2232. Where a brakeman in violation of his duty failed to set the brakes on cars left on the main track while other cars were being side-tracked, and the unsecured cars ran down the main track and collided with an approaching train and killed the fireman thereon, the company was held not liable, on the ground that they were fellow-servants.¹

2233. Where a brakeman was injured by contact with a car standing on a side-track too near the main track, and it appeared that the car was thus left in such dangerous position by operatives of trains in defendant's employ, it was held that the rule which makes it the duty of the master to provide a safe place for his employees to work had no application. That the obligation on the part of the master does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means or appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient.²

2235. The brakeman of one freight train is the fellow-servant of the brakeman upon another freight train employed on the same railroad. *Sullivan v. Railway Co.*, 97 Mo. 113; *Dixon v. Railway Co.*, 109 Mo. 413, 19 S. W. 412; *Parker v. Railway Co.*, 109 Mo. 362, 19 S. W. 1119, were distinguished, and the case of *Dixon v. Railway Co.*, 109 Mo. 413, 19 S. W. 412, was followed.

The court say: These cases reject the ruling of exemption, as it is often broadly stated though less frequently applied, that all are co-servants who are engaged by the same master in carrying on some general enterprise, no matter how different and disconnected the work may be. They assert the more reasonable and just rule, "that they are co-servants who are so related and associated in their work that they can observe and have an influence over each other's conduct, and report delinquencies to the common correcting power,

¹ *Relyea v. Kansas City, Ft. S. & G. R. Co. et al.*, 112 Mo. 86, 20 S. W. 480. ² *Schaub v. Hannibal & St. Jos. R. Co.*, 106 Mo. 74, 16 S. W. 924.

and they are not co-servants who are engaged in different and distinct departments of the work."

It was held that the brakeman and fireman were engaged in the same department of service, and were necessarily thrown into relation with respect to performance of their work, and were co-servants within the meaning of the rule.¹

2236. A laborer employed in building a bridge and an engineer operating the hoisting machinery are fellow-servants where both belong to the same working force under the orders of the same foreman; and the master is not liable for an injury to a laborer from the negligence of the engineer, and the master's order to lower a beam during the process of constructing the bridge does not render him liable for the act of a servant in the execution of the order in lowering the beam so carelessly as to inflict injury on a fellow-servant.²

2237. Plaintiff, a section-foreman on the railroad operated by defendants as receivers, was injured by coal thrown from a passing engine by the fireman, who had fastened it to a letter of instruction given him by the road-master for delivery to plaintiff. It was held that the receivers were not liable as principals for the negligent manner in which the fireman delivered the message. The two servants in the act of the fireman were co-operating together.³

Montana.

1. Statute.

Section 697, Statute of 1888.

2238. In every case the liability of the corporation to the servant or employee acting under the orders of his superior shall be the same in case of injury sustained by the default or wrongful act of his superior, or to an employee not

¹ Relyea v. Kansas City, Ft. S. & G. R. Co., 112 Mo. 86, 20 S. W. 480. ³ Grimes v. Eddy et al., 126 Mo. 168, 28 S. W. 979, reversing on re-

² Ryan v. McCully, 123 Mo. 636, hearing, Same Case, 28 S. W. 753.
27 S. W. 533.

appointed or controlled by him, as if such servant or employee were a passenger.

2239. Under the statute it was held that a conductor is a vice-principal as to a fireman where the latter is injured through his negligence; also, the conductor of one train is the superior of the fireman of another train where the latter is injured through the negligence of the former; also, that an engineer in charge of an engine was not a fellow-servant of the fireman where the latter was injured through his negligence.

This ruling was based upon the ground that was generally understood to be the doctrine of the *Ross Case*, 112 U. S., but subsequently the supreme court of the United States, in *Railway Co. v. Baugh*, 149 U. S., expressly held that the doctrine of the *Ross Case* did not extend to engineers in charge of engines; that an engineer and fireman upon a train were fellow-servants.¹

2240. It was held that under this statute, although the ruling would be different at common law, a fireman in the employment of a railroad company on one train, who was injured, caused by the negligence of the conductor of another train in the employ of the same company, was not a fellow-servant, but rather that the conductor was his superior within the meaning of the statute. It was said: "The view of the statute is to give a cause of action against a railroad company to every servant, who is himself without fault, for a default or wrongful act of any superior servant, whether or not the latter appointed or exercised any control over the former before or at the time of the infliction of the injury."²

2241. A miner was injured by the explosion of a blast which he had no means of knowing had not been removed. It was the duty of the foreman to see that it had been removed. It was held that the charge, which in substance

¹ *Ragsdale v. Northern Pacific R. Co.*, 42 Fed. 383.

² *Northern Pac. R. Co. v. Mase*, 63 Fed. 114 (C. C. A.).

stated "that this duty on the part of the foreman was that of a fellow-servant," was misleading if not improper.¹

2241a. The conductor and engineer of a train are the superiors of brakemen on the same train within the meaning of the statute.²

2241b. The foreman of a small extra gang of laborers engaged in repairing a railroad track was held not their superior, but their fellow-servant, though he had the power to hire and discharge them, and they were subject to his orders.³

Nebraska.

1. Duties Personal to the Master — Vice-principals.

2242. The conductor of a construction train on a railroad, with a gang of men engaged to work as day laborers for the railroad company, under the immediate orders of such conductor, is as to such men a vice-principal of the railroad company and not a fellow-servant of such men, and an act of gross negligence on the part of such conductor, whereby the lives of such men were placed in jeopardy while working under his immediate orders and directions, whereby one of them is killed, was held to be the negligence of the company. The doctrine of the Ohio courts was adopted and applied.⁴

2243. A conductor of a gravel train on a railroad, with a gang of men under his control, was held to be, as to such men, a vice-principal, and also a vice-principal as to the sub-boss under his control.⁵

2244. Where the foreman of a gang of men engaged in the business of repairing bridges, water-tanks and telegraph lines along the line of railway directed the men to hold on

¹ *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633.

⁴ *C., St. P., M. & O. R. Co. v. Lundstrum*, 16 Neb. 254, 20 N. W.

² *Crisswell v. Mont. Cent. R. Co.*, 17 Mont. 189, 42 Pac. 767.

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³ *Goodwell v. Mont. Cent. R. Co.* (Mont.), 45 Pac. 210.

⁵ *Burlington & M. R. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921.

to the rear end of a way-car and thus be propelled, and one of such men was injured at the time the cars were separated by losing his balance and falling from the car, it was held that such foreman, having power to control and direct the movements of the men, was a vice-principal.¹

2245. Employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule, and to make the rule applicable there must be some consociation in the same department or duty or line of employment. Hence, where a section-man was injured by a piece of coal falling from an overloaded tender, attributable to the neglect of the fireman, it was held that they were not fellow-servants.²

2246. Where an employee at work in an ice-house was injured by the act of the foreman sending down the chute a cake of ice, which struck such employee, causing him injury, it was held that such foreman, even as to such personal act, was a vice-principal.

It appeared that such employee had been directed by the foreman to release a block of ice which had become wedged or fastened in the chute, and while he was thus engaged, and without warning, the foreman sent a block of ice which was the cause of the injury.

It was said in reply to the argument that the act of the foreman was that of a mere laborer, and not one exercised in his capacity as the representative of the master, that the negligence and carelessness pertained not to the mere manual act of releasing the ice which caused the injury, but was rather imputable to the order which placed the employee in such situation, under the circumstances, that injury to him was unavoidable from the foreman's setting in motion the ice which caused the damage; that as to such order he represented the master.³

¹ *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775, 36 N. W. 285.

³ *Crystal Ice Co. v. Sherlock*, 37 Neb. 19, 55 N. W. 294.

² *Union Pacific R. Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347.

2246a. An engineer in charge of a locomotive attached to a train is not the fellow-servant of a foreman of a section crew, where the train is not connected with such foreman's work.¹

2. Fellow-servants.

2247. Brakemen upon the same train are fellow-servants.²

New Hampshire.

1. Rule.

2248. In 1860, in an action brought by an employee against his master, a railroad company, to recover damages for personal injuries received, the question of fellow-servants was discussed, but no rule declared as prevailing in the state. It was said that it had been held substantially that whether a workman is injured through inadequacy of machinery, or by other aids or means furnished by the master, or through incompetency or carelessness of fellow-workmen, his right of action stands upon the same ground; that between master and servant the implied contract is that each will use ordinary care in all things pertaining to the servant's business; that if a master exercise ordinary care in hiring and retaining in his employment a competent engineer, and in buying and continuing to use a suitable engine, the master should be no more liable to a brakeman if the engineer should be incompetent, or being generally competent should on some occasions be careless, than if the engine, apparently sufficient, should explode; that the master has performed his contract with the brakeman, so far as it relates to the engineer, where he has done all that ordinary care requires him to do to secure an engine and engineer reasonably suited to the business.³

¹ Omaha & R. V. R. Co. v. Krayenbuhl (Neb.), 67 N. W. 447.

³ Fifield v. Northern R. Co., 42 N. H. 225.

² C., B. & Q. R. Co. v. Howard, 45 Neb. 570, 63 N. W. 872.

2249. The rule was thus stated: The question who are fellow-servants, within the rule exempting an employer from the consequences of the negligence of fellow-servants, is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule those doing the work of servants are fellow-servants, whatever their grade of service; and the servant, of whatever rank, charged with the duty of the master towards his servants, is as to the discharge of that duty a vice-principal, and for his omissions or neglects the master is responsible, because he is vesting him with the responsibility of doing that which the master is bound to have carefully performed.

Hence it was held, where a weaver was injured by a shuttle flying out of the loom, due to the negligent manner in which the loom-fixer had previously repaired the loom, that the employer was liable for his negligence in this respect.¹

2. Fellow-servants.

2250. It was held that a foreman having charge of a gang of railroad laborers was the fellow-servant of one of them injured while loading rails upon the cars by a rail falling upon him, caused by the slippery condition of the car from an accumulation of ice and snow thereon, and that in the absence of notice to the company that the car was thus defective no liability attached to it.²

New Jersey.

1. Duties Personal to the Master — Vice-principals.

2251. It was held, where the master placed a boss in charge of the work of excavating a trench and it caved in, injuring an employee at work therein, that the negligence of such boss was chargeable to the master as his representa-

¹ Jacques v. Great Falls Mfg. Co.,
66 N. H. 482, 22 Atl. 552.

² Hawley v. Grand Trunk R. Co.,
62 N. H. 274.

tive; that the master's duty in respect to furnishing a safe place for work could not be delegated to another so as to relieve him from responsibility for the manner in which it was performed.¹

2252. The rule was stated that "When an employee's duty to inspect or repair the apparatus is incidental to his duty to use it in the common employment, then he is not intrusted with the master's duty to his fellow-servants for his fault, but if the master has cast the duty of inspection or repair upon an employee who is not engaged in using the apparatus in the common employment with his fellow-servants, then that employee in that duty represents the master, and the master is chargeable with his default."

It was accordingly held, where an employee engaged in unloading a vessel was injured by the breaking of a device — a cable — which was old, worn and rusty, and the duty of inspection and furnishing such materials was cast upon the plaintiff's store-keeper, that he was a representative of the master, and the master was liable for his negligence.²

2253. It was said: "It is a matter of judicial disagreement whether the master can discharge the duty of examining and ascertaining whether appliances have become unfit or unsafe from wear and tear or otherwise, and the similar duty of keeping tools and appliances in repair, by selecting and employing competent persons to make inspections and repairs. In our courts it is held that the master's duty may be thus discharged."³

2. Fellow-servants.

2253a. An employee of defendant company was injured by the fall of a sliding-door in the company's store. It was insisted that the injury resulted from the negligent and un-

¹ *Van Steenburgh et al. v. Thornton* (N. J. L.), 33 Atl. 380.

² *Ingebretson v. Nord Deutscher Lloyd Steamship Co.* (N. J. L.), 31 Atl. 619.

³ *Essex County Electric Co. v. Kelly* (N. J. L.), 29 Atl. 427, citing *Harrison v. Railway Co.*, 31 N. J. L. 293; *Machine Works v. Hand*, 50 N. J. L. 464.

skilful manner in which the door was constructed, and the careless manner in which the door was handled at the time of the accident. It was said: "If, at the time of the injury, he was lawfully in the vicinity of the building, in the course of his employment, he was a fellow-servant with the men whose negligence inflicted the injury upon him in the careless manner in which they opened the door. If he was there as a trespasser or with sufferance, no duty with respect to him rested upon the company, except to refrain from causing wilful injuries. He assumed all the ordinary risks incident to the character of the place, and was without remedy."¹

2254. A servant was employed in the blacksmith shop of a locomotive and machine works, and upon direction of an officer of the company repaired a chain which had been used in raising locomotive driving wheels to be worked on by another employee for such purpose when repaired. While being used by such latter employee, the chain broke at the link which had been repaired, causing him injury. It was held that such employees were fellow-servants in a common employment, and the plaintiff was without remedy against the employer. It was said: "The test which would determine what is a common employment of workmen has been fixed in this state, and this court has declared a fellow-servant to be 'one who serves and is controlled by the same master,' and common employment to be 'service of such kind that in the exercise of ordinary sagacity all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants they may be exposed to injury.'"²

2255. The rule was stated that "the master will not be liable to a servant in his employ for injuries occasioned by the negligence of a superior servant, who is also employed as a boss or foreman of other workmen with whom he labors in the execution of work designed and directed by the master or his vice-principal."

¹ Collyer, Adm'x, v. Penn. R. Co.,
49 N. J. L. 59, 6 Atl. 437.

² Rogers L. & M. Works v. Hand,
50 N. J. L. 464, 14 Atl. 766.

The facts were that the plaintiff was employed as a deck-hand on a dredge owned by the defendant. The machinery had stopped because the chain had jumped from the drum, and plaintiff took a position which exposed him to injury if the machinery moved. The machinery was started by the captain of the dredge. The captain had charge of the men, and was authorized to employ men to work on the dredge subject to the approval of the superintendent.

It seems to be held that all servants such as have full charge of the business, or a distinct department thereof, were fellow-servants, without regard to grade, rank or superiority.¹

2256. A corporation working a mine by a general superintendent is not responsible for an injury to a miner, which resulted from the negligence of a person employed to point out to the miners the place where holes were to be drilled, though he had authority to hire and discharge workmen.²

2257. A master is not liable to a servant for the negligence of a fellow-servant, while the two are engaged in the same common employment, unless for negligence in selection of the servant in fault, or in retaining him after notice of his incompetency. A fellow-servant is any one who serves and is controlled by the same master. Common employment is service of such kind that in the exercise of ordinary sagacity all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants it may probably expose them to injury.

The facts were that one of the laborers engaged in constructing a tunnel was injured, as was alleged, by the failure to provide proper means or appliances by which he could be safely and securely let down from the surface of the ground through shafts into the tunnel.

It was held that, the master having provided the proper means and directed their use, and being personally engaged in the work, the laborers whose duty it was to deliver

¹ O'Brien v. American Dredging Co., 53 N. J. L. 291, 21 Atl. 324.

² Gilmore v. Oxford Iron & Nail Co., 55 N. J. L. 39, 25 Atl. 707.

on the surface at the shafts or there use and keep in repair the instrumentalities provided by the defendant for the safe conduct of the laborers to and from the tunnel were in the view of the law fellow-servants of the deceased, whose place of labor was in the tunnel, and they were engaged in a common employment.¹

2258. Where a brakeman was killed by reason of the insufficiency of a bridge it was said: "If the company in point of fact directed its agents, who were possessed of competent skill, to examine at stated periods the bridge in question, and such agents reported to the company that the structure was in secure condition, and no circumstances existed which were calculated to impair a reasonable confidence in such report, it is plain, upon the principles of law, that even if the agents making such report acted carelessly in the discharge of their duties, or even falsely reported their conclusions to the company, that under such a state of facts the plaintiff could not sustain this suit. To warrant a recovery in this case in favor of the employee who is here represented by the plaintiff, the fault which forms the basis of the action must be that of the company, and not simply the negligence of a fellow-servant."²

2259. To constitute persons fellow-servants they need not be on a parity of service. It is sufficient if they be engaged in the same common work and acting for the accomplishment of the same general purpose. The president so far represents the corporation that it is liable for his acts of negligence. It was said that it was not necessary to go any further in determining the question who were fellow-servants.³

2260. The defendant owned a saw-mill and gave an order to a firm of machinists to make some alterations in the gearing of the water-wheel. They sent the plaintiff and another workman to do the work. It was understood between these

¹McAndrews v. Burns, 39 N. J. L. 117.

³Smith v. Oxford Iron Co., 42 N. J. L. 467.

²Harrison v. Central R. Co., 31 N. J. L. 293.

workmen and the defendant that the mill would run at such times as they were not actually at work upon the wheel. While they were at work upon the wheel the engineer of the defendant negligently started the wheel, injuring plaintiff. It was held that the plaintiff was a servant of the defendant engaged in a common employment with the engineer.¹

2260a. A mason's tender employed by the common master is a fellow-servant of such masons, and cannot recover for injuries received by the breaking of a scaffold defectively constructed by such masons.²

New Mexico.

1. Rule.

2261. A section-hand on a hand-car going to his place of work to aid in repairing the railway, and the conductor and engineer of a work train also engaged in repairing the railway, are fellow-servants, and the company is not liable for injuries to the section-man, caused by the negligence of the conductor and engineer. Such section-hand and his foreman are fellow-servants, and this relation is not changed by the fact that the foreman had charge of the men, hired and discharged them and directed their work, where it appears that he also worked as did the other men, and had nothing to do with paying them.³

2. Statute.

2262. Sections 2308-2310, Compiled Laws, provide in substance that where any person comes to his or her death by reason of the negligence or carelessness or criminal action of an agent, officer or other employee of a railroad company, that his or her representative may recover of the company \$5,000.

¹ Ewan v. Lippincott, 47 N. J. L. 192.

³ Atchison, T. & S. F. R. Co. v. Martin (N. M.), 34 Pac. 536.

² Maher v. McGrath (N. J. L.), 33 Atl. 945.

2263. It was held, following the decisions of the Missouri courts in respect to a similar statute (*Proctor v. Railway Co.*, 64 Mo. 112), that of Iowa (*Sullivan v. Railway Co.*, 11 Iowa, 422), that of Maine (*Carle v. Railway Co.*, 43 Me. 269) and Colorado (*Railway Co. v. Farrow*, 6 Colo. 498), that this statute was not intended to change the common-law rule as to liability for negligence of a fellow-servant, but only to give a cause of action to the representatives of a deceased person where none existed before, and to limit the extent of that liability. It was also held that employees on different trains of the same company were fellow-servants.¹

New York.

1. Rule.

2264. The general rule that where several persons are employed in the same general service, and one is injured by the carelessness of another, the employer is not responsible, was said to be at this time too well settled to be disputed, and was applied between an engineer of a gravel train and a laborer thereon, where the latter was injured by the negligence of the former while being carried to his home on the train.²

2265. In the case last cited the rule was applied, though the grades of the servants or employees were different and the person injured was inferior in rank and subject to the direction and general control of him by whose act the injury was caused. The rule was not affected by the fact that the one injured and the one causing the injury were not at the same time engaged in the same operation or particular

¹ *Lutz v. Atlantic & Pacific R. Co.* (N. M.), 50 Pac. 912. followed by *Coon v. Syracuse & Utica R. Co.*, 1 Seld. 492; *Sherman*

² *Russell v. Hudson R. R. Co.*, 17 N. Y. 134. *v. Rochester & Syracuse R. R. Co.*, 17 N. Y. 153; *Russell v. Hudson R.*

The general rule, as above stated, *R. Co.*, 17 N. Y. 134; *Boldt v. N. Y. C. R. Co.*, 18 N. Y. 432; *Wright v. N. Y. C. R. Co.*, 25 N. Y. 562.

work. It was said: It is enough that servants are in the employment of the same master, engaged in the same common enterprise, both engaged to perform duties and services tending to accomplish the same general purpose, as in maintaining and operating a railroad, operating a factory, working a mine or erecting a building.¹

2266. The liability of a master for an injury to an employee, occasioned by the negligence of another employee, does not depend upon the grade or rank of the latter, but the character of the act in the performance of which the injury arises. If the act is one pertaining to the duty the master owed the servants, he is responsible to them for the manner of its performance, but if the act is one pertaining to the duty of an operative, the employee performing it, whatever his rank or title, is a mere servant, and the master is not liable to a fellow-servant for its improper performance. Hence, where a superintendent of a factory, who clearly represented the master in the management of the business, negligently let steam on an engine near where the plaintiff was working, causing the plaintiff injury, it was held that as to such act he was merely a co-servant with the plaintiff.²

2. Duties Personal to the Master — Vice-principals.

2267. Where the management and control of an industrial enterprise or establishment is delegated to a superintendent with power to hire and discharge servants, to direct their labors and to obtain and employ suitable means and appliances for the conduct of the business, such representative stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master rendering him liable for the injury occurring to the servant therefrom.³

¹ Wright v. N. Y. C. R. Co., 25 N. Y. 562.

³ Pantzer v. Tilley Foster Iron Mining Co., 99 N. Y. 368; Corcoran

² Crispin v. Babbitt, 81 N. Y. 516. v. Holbrook, 59 N. Y. 517.

2268. Where an employee was injured caused by the negligence of the train-dispatcher, upon the question whether he was a representative of the master or a fellow-servant it was said: Where the train-dispatcher originates and promulgates such orders as were given in this case he is acting as the master, or, as it is said, his *alter ego*, and the master is liable for the negligence of the agent he has employed to do his — the master's — particular work. Referring to former cases it was further said: These cases make it plain that whenever the act is that of the master, or the duty to be performed is particularly his duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master.¹

2269. Where an employee was injured by reason of a defective brake, which defect, it was claimed, would have been discovered if proper inspection had been made, upon the question whether the neglect of the inspectors to properly perform their duties was chargeable to the master or was the omission of a fellow-servant it was said: "The duty of the master is to use reasonable care both in furnishing suitable machinery in the first instance, and in keeping it in repair. Proper inspection to discover defects is a part of the master's duty. The master is never exonerated by the negligent omission of subordinates to perform duties which are imposed upon him in his character as master, resulting in injury to other employees, even though proper rules have been adopted."²

2270. The failure of the conductor of a freight train to employ or secure a brakeman in a case where one employed failed to appear, and in starting the train with an insufficient force, as a result of which negligence a brake-

¹Hankins v. N. Y., L. E. & W. R. Co., 142 N. Y. 416. See, also, Sutherland v. Troy & Boston R. Co., 125 N. Y. 737.

²Bailey v. Rome, W. & O. R. Co., 139 N. Y. 302.

man was killed, was held not the neglect of a fellow-servant. It was the duty of the master to see that sufficient men were upon the train when it started to properly man it, and whoever failed in performing this duty, his neglect was chargeable to the master.¹

2271. Where an engineer was killed by the explosion of a boiler, caused by defects which it was alleged the defendant's mechanics ought to have discovered, to the suggestion that the negligence of the mechanics was that of a co-employee the following rule was stated: "The acts which the master, as such, is bound to perform for the safety and protection of his employees cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, and this whether the non-feasance or misfeasance is that of a superior officer, agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes it, or omits to perform it, is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the question whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by substituting competent servants or otherwise to secure the safety of his employees." ²

3. Fellow-servants.

2272. A switch-tender and one employed to tend chains across a street and to signal trains as occasion required were held to be fellow-servants, where the latter was injured by negligence of the former.³

¹Flike v. Boston & Albany R. Co., 53 N. Y. 549.

³Sammon v. N. Y. C. & H. R. R. Co., 62 N. Y. 251.

²Fuller v. Jewett, 80 N. Y. 46.

2273. A foreman having control over an employee with power to direct him as to his work is his fellow-servant. So held where such employee was injured, while working under the direction of such foreman, by the falling of an arch, caused by the removal of a center piece, the mortar not having sufficiently set to justify the removal of the center piece.¹

2274. It was held that those servants who were engaged to inspect the condition of structures of a railroad company, such as bridges, were fellow-servants of those operating trains. That the master had met the measure of his duty in providing fit and competent servants and adequate materials and resources for the work.²

2275. An employee employed to work upon the track and operatives of trains are fellow-servants, where the former was injured by the negligence of the latter.³

2276. An employee whose general duties relate to superintending the reconstruction of a line of road, yet who is engaged having control of a gang of men in repairing the old road, is as to such duties a fellow-servant of the men under his direction.⁴

2277. The fact that one employee upon a railroad is hired and discharged by one superior, and another by another, does not affect the relation of employees to each other as fellow-servants.⁵

2278. A telegraph operator in receiving from the train-dispatcher and communicating orders as to the running of trains is a fellow-servant of the operatives of such trains.⁶

2279. Where an employee, hired by a yard-master to assist him, and under his control, was injured by the negligence of

¹ Hofnagle v. N. Y. C. & H. R. R. Co., 55 N. Y. 608.

² Warner v. Erie Ry. Co., 39 N. Y. 468.

This was a pioneer case, and the distinction announced in later cases between servants who are engaged in respect to the appli-

ances and those operating them was not observed.

³ Boldt v. N. Y. C. R. Co., 18 N. Y. 432.

⁴ Brick v. Rochester, N. Y. & P. R. Co., 98 N. Y. 211.

⁵ Slater v. Jewett, 85 N. Y. 61.

⁶ Slater v. Jewett, 85 N. Y. 61.

such yard-master in giving a signal without warning such employee, it was held that as to such act the yard-master was his fellow-servant.¹

2280. The yard-master and head-brakeman upon a train of freight-cars were held to be fellow-servants of one engaged as a car-repairer, where the latter was injured by detached cars coming in contact with the car under which he was at work, caused by the breaking of a coupling-pin.²

2281. A master is not responsible to an employee for the negligent act of a competent and proper foreman to whom there has been no delegation of power and control of the business or a branch thereof, but who is simply charged with special duties, performing them under the direction of the master, the latter retaining general control and supervision. It is only where the master withdraws from the management of the business, intrusting it to a middle-man or superior servant, or where, as in case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligence of one of those acting in his stead. This rule was applied to a servant whose duties were to see to the repairs and the condition of appliances and the safety of the place where servants worked.³

2282. Bridge carpenter and division superintendent of depots and bridges are fellow-servants. The former cannot recover against the master for negligence of the latter.⁴

2283. The character of the act and not the grade of service determines the relation of fellow-servants. Hence, it was held that the captain of a boat and a laborer who was working under his direction in digging in a bank, both in the

¹ *McCosker v. L. I. R. R. Co.*, 84 N. Y. 77. correct, but its application to the facts can hardly be said to be in

² *Besel, Adm'x, v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 171. accord with the doctrine of the court as pronounced in later cases.

³ *Malone v. Hathaway*, 64 N. Y. 5. ⁴ *Neubauer v. N. Y., L. E. & W. R. Co.*, 101 N. Y. 607.

This case is often cited. Its doctrine as expressed is undoubtedly '

employ of the state, were fellow-servants. In this case *Ross v. Railway Co.*, 112 U. S. 377, was disapproved.¹

2284. The rule was applied where the superintendent, as to the servants employed in the work, stood in the place of the master, but in doing the work of a servant, in this case directing the removal of a hatchway, he was to be considered a servant, and consequently the master was not liable for the manner in which he performed the act. A master is not chargeable because of the designation of a place to work made dangerous only by the carelessness and neglect of fellow-servants, or by the negligent manner in which they use the tools or materials furnished for their work.²

2285. Where a printed and posted rule of a railroad company requires the conductor of a freight train to apply for instructions and additional help, or to set off cars, before attempting to take his train over a summit with dangerous grades, if in doubt as to his ability to make the passage safely, the exercise of judgment by the conductor in determining, upon the apparent facts, not to take such extra precautions, is the mere performance of one of his ordinary duties as an employee, and does not transform him from a fellow-servant of a brakeman into a representative of the company, so as to render the company liable for an injury to a brakeman on the train, suffered through such omission on the part of the conductor.³

2286. A car-repairer was directed by his immediate superior to go and borrow a spring from a car on a track where cars needing repair were placed (but they were not repaired there). There were two repair tracks upon which the work was done, and the repairers were protected by flags. On the other track cars were switched at all hours and no flags were used for protection of men. While removing the spring from a car on such unprotected track he was injured by the shunting of cars. It was insisted that the foreman, in directing such car-repairer to get the spring,

¹ *Loughlin v. State*, 105 N. Y. 159; ³ *Wooden v. Western N. Y. & Hussey v. Coger*, 112 N. Y. 614. Penn. R. Co., 147 N. Y. 508.

² *Hussey v. Coger*, 112 N. Y. 614.

represented the master. There was no proof that he was authorized to procure materials.

It was said: It would lead to the establishment of an exceedingly unsafe rule to hold that a gang-boss over forty or fifty men could, without direct authority from the company, change the safe and proper rules in pursuance of which the work in the repair yards was conducted, and direct workmen to prosecute their labors under cars standing on tracks other than the regular, duly-protected repair tracks. Such foreman was in no legal sense the representative of the defendant in suggesting that the car-repairer should procure the spring from a car upon another track. He was a fellow-servant making a very unwise and dangerous suggestion.

The rule was stated to be that a servant who sustains an injury from the negligence of a superior agent engaged in the same general business cannot maintain an action against their common employer, although he was subject to the control of such superior agent and could not guard against his negligence or its consequences.¹

2287. The defendant used cars drawn by a locomotive for removing its furnace refuse. An employee, while riding upon the top of one of such cars, was injured by its dumping, that is, by reason of the attachment which held the side giving way or becoming unfastened. There was no evidence that the attachments were defective. The natural inference was that some one of the employees had neglected to properly adjust the hooks after the car was dumped on its first trip. It was held that he could not recover.²

2287a. A new wick in a head-light is a supply, and not a repair, and the failure of an engineer to replace an old wick with a new, where such is made his duty under the rules, is the neglect of a fellow-servant of a fireman upon another train injured by such neglect.³

¹ *Keenan v. N. Y., L. E. & W. R. Co.*, 145 N. Y. 190.

³ *Simpson v. Central Vt. R. Co.*, 39 N. Y. S. 464, 5 App. Div. 614.

² *Soderman v. Kemp*, 145 N. Y. 427.

2288. Where a longshoreman, while engaged in unloading freight from a steamer, was injured by the parting, caused by being insecurely fastened, of one of the skids tied to a mouth-piece, so called, on the dock, the purpose being to permit the skid and mouth-piece to move back and forth with the movements of the vessel, he being engaged at the time in using a truck, the wheel of which dropped into the opening, causing the load to fall upon him, it was held that he could not recover; that, as the work of adjusting the appliance was improperly done, it was the negligent act of his co-employees.¹

2289. A car-inspector was injured while performing his duties in defendant's yard, by cars being shunted in upon the same track, and against the car upon which he was at work, by other employees of the defendant. The negligence charged was that there was no brakeman on the shunted cars. One had been provided and directed to take his position upon the cars. It was held that a refusal to nonsuit was error; that, assuming that there was not a brakeman upon the shunted cars, the negligence was that of a co-servant, not of defendant.²

2290. In a late Wisconsin case, where the facts were somewhat similar, the servant being upon the rear end of the car, it was held the personal duty of the master to see that he occupied his proper post of duty.³

2291. The master and seamen of a vessel are engaged in a common employment, and are fellow-servants, although of different grades. While the master in rendering to the seamen that care and in performing those duties imposed upon its owners by the maritime law represents them, and for a neglect of duty in these respects they are liable, yet in all matters outside the scope of the master's employment and without the authority committed to him by the maritime

¹ McCampbell v. Cunard Steam-ship Co., 144 N. Y. 552. Co. of N. J. v. Keegan, 160 U. S. 259.

² Potter v. N. Y. C. & H. R. R. Co., 136 N. Y. 77. See Central R. ³ Promer v. Railway Co., 90 Wis. 215.

law, his misconduct is a risk assumed by the seamen, for the consequences of which the owners are not responsible.¹

2292. Where one employed by the defendant as a laborer in a quarry, under the direction of a foreman, was injured while drilling, and it appeared that there was an unexploded blast, which was examined by such foreman, who failed to remove the fuse, and set other workmen drilling within two feet of it, and he, plaintiff's intestate, some thirty feet from it, when the fuse caught fire and the charge exploded, killing him, it was held that, assuming such foreman to have been negligent, his negligence was that of a fellow-servant. When a blast was exploded and the men came back, the manner of their distribution for work was not a duty of the master, but one of the details necessarily resting upon the intelligence and care of the servants to whom that duty was intrusted.²

2293. Where an employee, engaged in coupling cars, was injured by slipping into a pit between the tracks, in which were appliances, and it appeared that the covering was taken off by the employees who were repairing such appliances and who neglected to replace it, it was held that his injuries were attributable to the negligence of his co-servants, and he could not recover.³

2294. Where a switchman in defendant's employ was injured while in the performance of his duties by timber falling upon him from a passing car, the result of improper loading by defendant's employees, it was held he could not recover; that such employees were his fellow-servants.⁴

2295. Where an employee was killed while upon a car loaded with timber at a way station, which was to be taken into a train and was being moved by a switch-engine to the main track, the brake being useless by reason of the manner in which the lumber was loaded, whereby a collision occurred,

¹ *Gabrielson v. Waydell*, 135 N. Y. 1.

⁴ *Ford v. Lake Shore & M. S. R. Co.*, 117 N. Y. 638. See, also, *Byrnes*

² *Cullen v. Norton*, 126 N. Y. 1. v. N. Y., L. E. & W. R. Co., 113 N. Y.

³ *Filbert v. Del. & H. C. Co.*, 121 N. Y. 207.

and it appeared that the defendant's rules made it the duty of the station master to either inspect the car himself or have someone do it before it was taken out, and if this duty had been performed the improper loading would have been discovered, it was held, as the defendant had provided a safe car, and a system and competent men for its inspection, for injuries resulting to an employee for their neglect of this duty it was not liable.¹

North Carolina.

1. Rule.

2296. A servant does not undertake to incur the risks that may result from the negligence of the master or such person to whom he may choose to delegate his authority in that branch or department of business in which he is engaged. To impute the negligence of such an agent to the master he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and, in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, direct their labor and purchase materials, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination and to whom they owe the duty of obedience. Such an agent is what is known as a middleman, who, as well as the laborer, is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a fellow-servant in the sense that term is used by the courts, because he represents the master in his authority to direct, control and manage the business. To such an agency the maxim *qui facit per alium* applies. His acts are the acts of the master, his duties the duties of the master, and his neglects and omissions the neglects and omissions of the master.

¹ *Byrnes v. N. Y., L. E. & W. R. Co.*, 113 N. Y. 251.

The court seemingly adopt the following statement of the supreme court of New York in *Brickner v. Railway Co.*, 2 Lans. 504: "Though such superintendent may also labor like other co-laborers and may be in that respect a co-laborer, and his negligence as such co-laborer may be likened to that of any other, yet if, by appointment of the master, he exercises the duty of master, as in the employment of servants, in the selection for adoption of machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of the other and subordinate servants, then his acts are executive acts and the acts of a master, and the corporations are responsible that he shall act with a reasonable degree of care for the safety, security and life of the other persons in their employ."

Hence, where a workman upon a gravel train was injured while digging gravel under the direction of one who was engineer, superintendent, conductor and master of the gravel train, whose business it was to employ and discharge hands connected with the train, and who had entire charge of this branch of the business over a section of defendant's road, it was held that they were not fellow-servants.¹

2. Duties Personal to the Master — Vice-principals.

2297. In entering the master's service a servant is presumed to understand and take upon himself every risk naturally pertaining to such service, and amongst others that which may proceed from the possible carelessness of such fellow-servants as he must know from the very nature of the employment he may be required to associate with in the performance of his duties. But no such presumption is raised of his undertaking to assume the risk growing out of the possible negligence of one who, like a servant of their common master, stands himself in the light of a superior, whose commands and directions he is bound to obey; for so to hold in the case of a railroad corporation, which can

¹Dobbin v. Richmond & D. R. Co., 81 N. C. 446.

only operate through its agents and employees, would be to absolve it from all responsibility to those in its employment.

Where the claim was that a brakeman was under the immediate direction and control of one who was the engineer and conductor of a freight train, and was injured by the latter's negligence while the former was engaged in coupling cars, it was said: "If such engineer stood to the plaintiff as one in authority the above rule would be applicable."¹

2298. A railroad section-master, duly authorized to hire, direct and discharge the hands of his section, suddenly ordered a new section-hand, in the course of his employment, to jump from a swiftly moving train, whereby such section-hand was injured. It was held that, the foreman being a vice-principal, the company was liable.

This ruling was based upon the ground that he was invested with full authority to employ laborers and to superintend them, and to give them orders and commands, and to discharge them from such employment in his discretion. It was said: This case is not like the ordinary one of injury done by one fellow-servant acting as foreman or leader of several or many laborers to one of his fellow-servants.²

2299. Where a brakeman, contrary to the rules of the company prohibiting him from going between the cars to couple, and where he had entered into an agreement waiving all liability on the part of the company for injuries resulting from any violation of the rule, obeyed an order by a conductor directing him to go between the cars to couple when he failed to couple with the stick, and he was injured, it was held that the conductor was the full representative of the master; that his order to the brakeman was a waiver by the company of the brakeman's agreement.³

2300. Carpenters employed by the master to make any needed repairs in a platform used by an employee in loading

¹ *Cowles v. Richmond & D. R. Co.*, 84 N. C. 309.

³ *Mason v. Richmond & D. R. Co.*, 111 N. C. 482, 16 S. E. 698.

² *Patton v. Western N. C. R. Co.*, 96 N. C. 455, 1 S. E. 863.

lumber on trucks were held not to be fellow-servants of the employee. This duty was one personal to the master, and for its non-performance or negligent performance by those intrusted with the duty the master is chargeable.¹

3. Fellow-servants.

2301. The term "fellow-servants" includes all who serve the same master, work under the same contracts, derive authority and compensation from the same source, and are engaged in the same general business, although it may be in different grades and departments of it. A foreman who directs the work of other servants is as much a servant as those whose work he superintends, and if the common master has a general supervision of the work he is not liable for the foreman's negligence, although the injured servant is obliged to obey his orders.

So where it appeared that the car-repairer, while at work upon cars on the track, was injured by other cars being moved against them, it was held that if the injury was due to the negligence of the engineer or of the yard-master, who had the general management of making up, switching and receiving trains, they were his fellow-servants.

The language quoted in *Dobbins v. Railway Co.*, 84 N. C. 446, was approved. *Cowles v. Railway Co.*, 84 N. C. 309, was not referred to.²

2302. Where a car-coupler was injured, as was alleged, by the negligence of the yard-master, and it appeared, while the yard-master had no authority to employ servants, he had authority to discharge such as disobeyed him, it was held that he was a fellow-servant with the car-coupler.³

2303. The complaint stated that the plaintiff, a brakeman, was injured by the negligence of an engineer. It was held there was no cause of action stated against their common master. They were fellow-servants.⁴

¹ *Chesson v. John L. Roper Lumber Co.* (N. C.), 23 S. E. 925.

² *Kirk v. Atlanta & Charlotte A. L. R. Co.*, 94 N. C. 625.

³ *Webb v. Richmond & D. R. Co.*, 97 N. C. 387, 2 S. E. 440.

⁴ *Hagins v. Cape Fear & Y. V. R. Co.*, 106 N. C. 537, 11 S. E. 590;

North Dakota.

1. Fellow-servants.

2304. A section-foreman and a train conductor are co-employees under section 1130 of the Civil Code, exempting an employer from liability to one of his servants for an injury resulting from the negligence of another of his servants engaged in the same general business, where the former is injured by the negligence of the latter. The act merely adopts the common law, leaving it to the courts to determine whether persons are co-employees in a common business.¹

2305. The negligence of a foreman of a gang in failing to block a pile which was shoved against plaintiff, injuring him, because it was not blocked, was held to be the negligence of a fellow-servant, although the foreman had authority to employ and discharge plaintiff, and the plaintiff was under his superintendence and control in doing the work in the performance of which he was injured. It was said: "Those cases which preserve the fellow-servant rule in its full integrity bring the facts of each case to the test, not of the rank of the negligent servant, but the character of the negligence from which the damage results. Did the master owe to his servant a duty as master? Answer the inquiry in the affirmative, and he cannot escape a careless discharge of that duty by shifting the burden to the shoulders of a servant, however inferior his position may be. The negligence of a fellow-servant has not wrought injury in such a case. It is the negligence of the master himself, because that was carelessly done which he was bound to have carefully performed. The master must use due care in supplying his servants with safe appliances and providing them a safe place in which to work. These are duties of the master, and he cannot gain exemption from the negligence of another by delegating these personal duties to another. On the other hand, the

Hobbs v. Atlantic & N. C. R. Co.,
107 N. C. 1, 12 S. E. 124.

¹Elliott v. C., M. & St. P. R. Co.,
5 Dak. 523, 41 N. W. 758.

mere superiority in rank of a negligent servant, his right to control the servant injured, and to employ and discharge him, calls for no modification of the fellow-servant rule."¹

Ohio.

1. Vice-principals.

2306. Where an employer places one person in his employ under the direction of another also in his employ, such employer is liable for injuries to the person of him placed in the subordinate situation by the negligence of the superior. Hence, where a railroad company placed an engineer under the control of the conductor of a train, whose duties included the directing when the cars were to start, stop, etc., and through the negligence of such conductor the engineer was injured while each was engaged in his respective employment, the company was held to be liable.²

2307. Where a railroad company placed a brakeman in their employ under the control of the conductor, the latter having the exclusive command of the train and the brakeman, and the brakeman, without fault on his part, is injured by the carelessness of the conductor, he may recover from the company. It was said, however: "But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant when both are engaged in a common service and no power of control is given to one over the other. They stand as equals to each other and are alone liable for the injuries they may occasion."³

2308. Where the servant superior in authority performs a negligent act whereby one under his control receives injury, the master is responsible to the same extent as though he had directed another to do the careless act. Hence, where a laborer in a quarry was injured by a stone which

¹ *Ell v. Northern Pacific R. Co.*,
1 N. Dak. 336, 48 N. W. 222.

³ *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201; *Railway Co. v. Spangler*, 44 Ohio St. 471.

² *Little Miami R. Co. v. Stevens*,
20 Ohio, 416; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.

was being hoisted falling upon his foot, and the foreman himself attached hooks to it, which was a device used for hoisting stone, where he should have hoisted it by means of chains which were at hand and generally used for hoisting soft stones, which was the character of the one which fell, and the hooks gave way by reason of the softness of the stone, it was held that the plaintiff should recover,—the foreman was not his fellow-servant.¹

2309. Where a car-repairer who was under the direction of a foreman was injured while repairing cars upon the track, by other cars being shunted against them, and no provision had been made to warn him against such danger, it was held that the injury was due to the neglect of such foreman in not properly warning or guarding him, or providing means by which he would be warned. That such foreman was his superior, and therefore he was entitled to recover from the company.²

2310. The rule was not applied where a section-man, while working upon the track, was injured by a passing train, running at a rapid rate of speed while racing with a train upon a parallel track. The exact ground of the decision is not quite plain, although I assume it to be that as it did not appear but that the engineer in running at such a dangerous rate of speed might have been acting under orders, it would not be presumed he was negligent; further, that without determining whether the statute relating to signals was for the protection of employees, there was, independent of it, a duty on the part of the company to make and enforce reasonable rules and regulations to guard against danger at crossings and dangerous places, and that deceased, when he entered the employment, had a right to expect the performance of that duty, and as there was no proof in respect to this matter a case was presented for the jury.³

¹Berea Stone Co. v. Kraft, 31 Ohio St. 237.

³Dick v. Railroad Co., 38 Ohio St. 389.

²Lake Shore & M. S. R. Co. v. Lavalley, 36 Ohio St. 221.

2. Fellow-servants.

2311. Where a track-repairer was injured by the negligence of a fireman upon the train in throwing a stick of wood from the tender, striking plaintiff, it was held, as no degree of subordination existed between the two, that they were fellow-servants.¹

2312. Those employed in facilitating the running of trains by ballasting the track and removing obstructions, and those employed at stations attending to switches and other duties of a like nature upon the road, as well as those upon the trains, operating, are regarded as fellow-servants in the common service.²

2313. If a defect in appliances (a brake-chain) was owing to the neglect of other operatives of the road whose duty it was to inspect said brake, but who neglected so to do; and negligently suffered the same to continue in use when not road-worthy, unknown to the company, the company is not liable to a brakeman injured by reason thereof, inasmuch as such delinquent inspector is to be regarded as a fellow-servant of such brakeman.³

2314. In case of injury to a servant by the negligence of another, it is immaterial whether he who causes and he who sustains the injury are or are not engaged in the same or similar labor, or in positions of equal grade or authority. Upon this doctrine but a single exception has been engrafted. That exception is "that when one servant is placed in a position of subordination and subject to the orders and control of another servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the inferior servant against the master." But this is the extent and limit of the exception. Hence a railway company was held not liable

¹ *Whaalen v. Mad River & L. E. R. Co.*, 8 Ohio St. 249.

² *Manville v. Cleveland & Toledo R. Co.*, 11 Ohio St. 417.

³ *Columbus & Xenia R. Co. et al. v. Webb*, 12 Ohio St. 475; *Railroad Co. v. Fitzpatrick*, 42 Ohio, 318.

in damages to a brakeman on one of its trains for injuries sustained by him in a collision of his train with another train of the same company, where the collision occurred by means of the negligence of the conductor or engineer, or both, of such train.¹

2315. Where an engineer and brakeman were employed by a railroad company in operating the same train, and there was no evidence to prove that the brakeman was placed in a position of subordination to the engineer, other than what might be implied from the rules of the company requiring the engineer to give certain signals as a notice to apply or loosen the brakes, and requiring the brakeman to manage the brakes according to circumstances and the signals of the engineman, and placing the brakeman on the train in subordination to the conductor, it was held that the engineer and brakeman were fellow-servants of the company, engaged in a common service; that the relation of superior and subordinate did not exist between them. Therefore the company was not liable to the brakeman for an injury occasioned by the negligence of the engineer.²

2316. A hand employed to load and unload gravel from a construction train while riding to the place of unloading from the gravel pit is an employee, and a co-employee of the engineer of the train.³

3. Statute of April 2, 1890 (Ohio Laws, vol. 87, p. 149).

Act of April 1st.

2317. The title reads as follows: "For the protection and relief of railroad employees; forbidding certain rules, regulations, contracts and agreements, and declaring them unlawful; declaring it unlawful to use cars or locomotives which are defective, or defective machinery or attachments thereto belonging, and declaring such corporation liable in

¹ *Pittsburg, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196; *Railway Co. v. Ranney*, 37 Ohio St. 665.

² *Pittsburg, Ft. W. & C. R. Co. v. Kumler v. Junction R. Co.*, 33 Ohio St. 150.

certain cases for injuries received by its servants and employees on account of the carelessness or negligence of a fellow-servant or employee."

The first section makes it unlawful for any railroad company to require any of its employees to agree in advance to hold the corporation blameless for any injury he may sustain for which he otherwise might recover damages from the company. It forbids the company to require an employee to contribute any part of his wages to an association. It gives him the right, if discharged, to require within ten days a reason from the company for his discharge, and provides a penalty for the violation of the section.

SEC. 2. It shall be unlawful for any corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereunto are in any manner defective. If the employee of any such corporation shall receive an injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being run and operated, by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained; and where the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee or his legal representatives against any railroad corporation for damages on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation.

SEC. 3. That in all actions against the railroad company for personal injury to, or death resulting from personal injury to, any person while in the employ of any such company, arising from the negligence of such company or any of its officers or employees, it shall be held, in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow-servant, but the superior of such employee; also

that every person in the employ of such company, having charge or control of employees in any separate branch or department, shall be held to be the superior, and not the fellow-servant, of employees in any other branch or department, who have no power to direct or control in the branch or department in which they are employed.

2318. A railroad company is chargeable with knowledge of defects in its cars, locomotives, machinery and their attachments, as provided in the second section of the act of April 2, 1890 (87 Ohio Laws, p. 149), and to overcome the effect of such knowledge the company must show that in fact it did not have such knowledge, and that it used due diligence to ascertain and remedy such defects. The presumption of diligence, raised by proof of the employment of competent and careful employees, will not be sufficient to overcome the effect of knowledge of defects which by this statute it is deemed to have.

In the trial of a personal injury case against a railroad company for injuries caused by defects in its cars, locomotives and machinery, or their attachments, the defects so causing the injury are *prima facie* evidence of negligence on the part of such corporation, and by force of this statute the burden is thrown upon the company to show by proof that it used due diligence and was not guilty of negligence.¹

2319. An engineer in charge of a locomotive engine on one train of cars of a railroad company is in a branch or department of service separate from that of a brakeman on another train of the same company within the meaning of the terms "separate branch or department," as those terms are employed in section 3 of the act of April 1, 1890 (87 Ohio Laws, p. 150).

An engineer in charge of a locomotive engine, who has authority to direct or control a fireman serving on the same locomotive, is a "superior" within the meaning of the above-named section.

Whether an engineer or other employee of a railroad

¹ Railway Co. v. Erick, 51 Ohio St. 146.

company has authority to direct or control other employees of the same company is a question of fact to be determined in each case. This may be done, however, either by proof of express authority or by showing the exercise of such authority to be customary, or according to the usual course of conducting business of the particular company interested, or of railroad companies generally.¹

2320. By virtue of the provisions of the third section of this statute, a chief inspector of cars, having other inspectors under him, is not the fellow-servant of a brakeman.²

2321. A train-dispatcher who has complete control of the movements of all trains on a division of a railroad is not the fellow-servant of the engineer of a train running on such division, either at common law or under the statute.

A telegraph operator at a station on the line of a railroad, whose duty it is to receive telegraphic orders relative to the movements of trains from the train-dispatcher at another place, and communicate them to the engineers and conductors of trains at his station, is not the superior, but the fellow-servant, of the engineer of a train on such railroad, both at common law and under the statute.³

2321a. That part of the first section of the act which prohibits employees from making contracts limiting the liability of the company is unconstitutional.⁴

Oregon.

1. Duties Personal to the Master — Vice-principals.

2322. Where it was urged that a section-foreman having knowledge of obstructions upon the track — a land-slide — failed to warn employees upon a train going out to repair the track where it might have been damaged by a recent storm was guilty of negligence which was chargeable to the

¹ Railroad Co. v. Margrat, 51 Ohio St. 130.

² Railway Co. v. Erick, 51 Ohio St. 146.

³ Baltimore & O. R. Co. v. Camp, 65 Fed. 952.

⁴ Shaver v. Pennsylvania Co., 71 Fed. 931.

company, it was said: "If at the time of the accident the track-men and section-master were engaged in looking after and removing obstructions from the road, caused by the recent storm, and the plaintiff's intestate constituted one of the train-men engaged in the same service, or in repairing the road or removing obstructions therefrom, then as to such service the train-men, track-men and section-master were fellow-servants. If, however, the section-master had knowledge of the land-slide, he was bound to inform those in charge of the repair or any other train passing over the road, and a failure to do so would subject the defendant to liability. It may be assumed that a part of the section-master's duties was to look after obstructions on the track and to cause the same to be removed as soon as possible after they should come to his knowledge. If these were his duties, then as to such duties he represented the master."¹

2323. Where an employee upon a train sent out to repair the track from damage by storm was killed by the giving way of a bridge, in considering a proposed instruction in substance that the defendant was not liable for the negligence of its servants employed at the time of the accident to watch over and ascertain the condition of the track and bridges, it was said: "The duty to inspect its road and keep proper watch and oversight over it is the personal duty of the master, for the negligent performance of which it cannot exempt itself from liability by showing that it has delegated that duty to an employee."²

2324. The plaintiff was an employee of defendant performing work in excavating a tunnel. There was a general superintendent of the work. The plaintiff was working under the direction of a foreman, there being other gangs of men working under other foremen. Such foreman had the direction of the men in charge of the blasting, directing

¹ *Wellman v. Oregon S. L. & U. N. R. Co.*, 22 *Oreg.* 533, 30 *Pac. N. R. Co.*, 21 *Oreg.* 530, 28 *Pac.* 625. 425.

See, also, *Fisher v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 450, 28 *Pac.* 497.

where charges should be made, and the removing of the debris. It was necessary that the debris should be removed in order to clear a place for drilling after each blast, and also, as was claimed, to enable the discovery of any unexploded blasts. The foreman neglected to make removal of the debris sufficient for the latter purpose, and while the plaintiff was engaged in drilling, an unexploded charge was struck causing an explosion which injured him.

The contention was whether the foreman was as to such act and duties a fellow-servant. It was held he was a vice-principal, upon the ground that to him was intrusted the master's duty to take reasonable precautions to keep the place of work safe. The doctrine of the different courts was stated and discussed, including that of superior and subordinate, but the court was non-committal as to any other than the one upon which its ruling was based.¹

2. Fellow-servants.

2325. A switchman, that is, one whose duties pertain to the operation of a switch, and train operatives are fellow-servants. Their duties are in connection with the operation of the road and not in preparing or keeping in repair the appliances used or the place of work.

This is in accord with the almost uniform decisions of the courts elsewhere.²

2326. A section-hand riding on a work train from one place of his work to another, under the charge of a roadmaster, is a fellow-servant of the conductor and engineer. The court states that there is a respectable line of authorities holding the doctrine of superior and subordinate, but that question was not involved in the present case.³

2327. Where an employee was injured by the improper manner in which other employees, engaged in the same

¹ Anderson v. Bennett, 16 Oreg. 515, 19 Pac. 765.

³ Knahtla v. Oregon Short Line & U. N. R. Co., 21 Oreg. 136, 27

² Miller v. Southern Pacific R. Co., 20 Oreg. 285, 26 Pac. 70.

work, operated the appliances used in moving timbers, it was held that no liability attached to the employer; that the injury was caused by the acts of his fellow-servants.¹

Pennsylvania.

1. Duties Personal to the Master — Vice-principals.

2328. The officer having charge of the department of business in which the alleged injury occurs is the person required to use that degree of diligence in the selection of competent employees which is necessary to exempt the company from liability for their negligence. His carelessness and knowledge in this respect is the carelessness of the company.²

2329. A corporation can only act through its officers and agents; and the officer having charge of its business for practical purposes must be regarded as the corporation.³

2330. Where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, and exercising no discretion and no oversight, any neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities is a breach of duty for which the master is liable. The risk which the laborer assumes, of injury from the neglect of his fellow-employee, is when they are co-operating in the same business, so that he knows that the employment is one of the instances of their service.

Hence, where the plaintiff was engaged as a laborer by a stevedore employed by a ship-owner, and he was injured by the parting of a rope which was defective, and it appeared the rope was one that had been spliced by the mate before the arrival in port, it was held that whether the mate and laborer were fellow-servants was a question of fact. It was said: "The jury would be required to find whether the neg-

¹ Weeklund v. Southern Oregon Co., 20 Oreg. 591, 27 Pac. 260.

³ Ardesco Oil Co. v. Gilson, 63 Pa. St. 150.

² Frazier v. Pennsylvania R. Co., 38 Pa. St. 104.

ligence of the mate was one of the risks which the plaintiff should be held to have assumed. The result would depend upon what should be ascertained to be their relations to each other, the extent to which they were brought into contact, and to which they were engaged in the common employment, and the connection of the duties of each with the duties of the other."¹

2331. A boiler-maker in the machine shop of a railroad company is not such a co-employee of an engineer on a locomotive as will relieve the company from his negligence in repairing a boiler.²

2332. A train-dispatcher, vested with the power and authority for moving trains, changing the schedule, time, or making new schedules, as regards the employees moving trains is a vice-principal and not a fellow-employee, and in case of an injury resulting to an employee in consequence of his negligence, the company is liable.³

2333. Where a foreman in defendant's employ had power to hire men and discharge them, and to a certain point to fix their compensation, he has sufficient control of defendant's business to render notice to him of the incompetency of a servant notice to the defendant.

2. Fellow-servants.

2334. In order that workmen should be fellow-servants within the meaning of the rule that the master is not responsible to a servant for an injury caused by his fellow-servant, it is not necessary that the workman causing and the workman sustaining the injury shall be both engaged in the particular work. It is sufficient that they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purpose; and the rule is the same although the one in-

¹ Mullan v. Phil. & L. M. S. Co., 78 Pa. St. 25.

² Penn. & N. Y. C. & R. Co. v. Mason, 100 Pa. St. 296.

³ Lewis et al. v. Seifert, 116 Pa. St. 628, 11 Atl. 514.

⁴ Wust v. Erie City Iron Works, 149 Pa. St. 263, 24 Atl. 291.

jured may be inferior in grade and subject to the control and directions of the superior whose act caused the injury, provided they are both co-operating to effect the same common object. Hence, a mining boss and a driver boss in a mine and their assistants, including the engineer and miners, whether at work inside or outside of the mine, are all engaged in the same common work and are fellow-servants.¹

2335. A general manager and superintendent of the defendant company, sent a millwright and machinist in defendant's employ to take charge of the repairs of a rolling-mill; and, as an inducement to hasten the work, agreed to pay him in addition to his daily wages, \$50. Such millwright employed a carpenter to assist in the work under his direction, but who was paid by the company. While thus employed the carpenter was injured, as was alleged, through the negligence of the millwright. It was held that he could not recover, as they were fellow-servants.²

2336. Under the provisions of the mining act of 1870 mining bosses and miners are fellow-servants, and where the death of the latter is caused by the negligence of the former, the owner of the mine is not responsible therefor.³

2337. If a gang-boss has not general control, but acts as foreman of workmen engaged and furnished to him by the superintendent of the company, whose orders he is bound to obey, he is not such a representative of the company as that the company would be liable for his acts of negligence.⁴

2338. The engineer and fireman in a mill are fellow-servants of the operatives therein.⁵

2339. A foreman of a gang of men working on a railroad is their fellow-servant. Hence, where the foreman told them to go to their working place on a hand-car, that there was time enough before an expected train would overtake them,

¹ Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432.

² National Tube Works v. Bedell, 96 Pa. St. 175.

³ Delaware & Hudson Canal Co. v. Carroll, 98 Pa. St. 374.

⁴ Keystone Bridge Co. v. Newberry, 96 Pa. St. 246.

⁵ Caldwell et ux. v. Brown et al., 53 Pa. St. 453.

yet they were overtaken by such train and one of them killed, and it appeared that the foreman's watch was slower than that of the conductor on the train, it was held the defendant company was not liable.¹

2340. Where one of the laborers on a railroad gravel train was injured through the carelessness of the conductor or engineer by the dumping of one of the cars while on their usual passage between the lodgings and their work, it was held that the employers were not answerable. The negligence was that of a fellow-servant.²

2341. If an employee, at any time during the erection of the machinery around which he was afterwards killed, was engaged as one of the hands for the accomplishment of the purpose, he and all those laboring with him, though coming from other shops, must be regarded as co-employees. It does not matter that he happened to be absent at the time the faulty piece which caused the injury was put in place.³

2342. Where machinery was held together by two clamps, which were claimed to be improper appliances and made the use of the machinery dangerous, and one of the clamps broke and the engineer continued to run the machinery with one clamp, which rendered the use of the machinery more dangerous, and this afterwards broke, injuring a workman engaged in the same general business, it was held the employer was not responsible, for the proximate cause of the injury was the carelessness of the engineer in running his engine when it was dangerous, and he was a fellow-servant.⁴

2343. Where a car-repairer was injured while repairing a car on the track, by other cars being shunted against the one under which he was at work, caused by the brakeman or car-dropper dropping in more cars than he could control, and it appeared such car-repairer knew the danger and the precautions that were taken for his safety, it was held he

¹ *Weger v. Penn. R. Co.*, 55 Pa. St. 460.

² *Ryan v. Cumberland V. R. Co.*, 23 Pa. St. 384.

³ *Reading Iron Works v. Divine*, 109 Pa. St. 246.

⁴ *Philadelphia Iron & Steel Co. v. Davis*, 111 Pa. St. 597, 4 Atl. 513.

could not recover, on the ground that the negligence was that of a fellow-servant.¹

2344. Where an engineer of the defendant company, while crossing the tracks in the company's yard on the way to get his engine, was run down and killed by a freight train, his death being caused, as was alleged, by the negligence of the engineer of such train, it was held that they were fellow-servants and recovery was denied.²

2345. A mining boss is such a fellow-servant as in case of injury to other employees through his negligence the master is not responsible.³

2346. Where, by reason of the negligence of a station-master in the employ of a railroad company in not delivering a telegram to an engineer of a passenger train having the right of way, notifying him that a switch was open, by means of which he must cross from one track to another to get around a freight train on the same track, and cautioning him as to the rate of speed, the engine was thrown from the track at the switch and the engineer killed, it was held that the injury was occasioned by the negligence of a co-employee and no action could be maintained.⁴

2347. A switchman who was one of a gang employed in a shop-yard in carrying to and from the machine shops supplies and repaired or finished articles upon cars run in by means of side-tracks, they working under separate foremen, was held to be such fellow-servant of a gas-fitter, who under the directions of the master mechanic (the latter in charge of all shops, with the power to employ and discharge men) was directed to extend a gas pipe between two of the shops, who placed it at such a height as to brush the switchman from the top of the cars running in between them, as precluded

¹Campbell v. Pennsylvania R. Co. (Pa. St.), 2 Atl. 489. Simoson et ux., 112 Pa. St. 567, 4 Atl. 725; Redstone Coke Co. v.

²Keyes v. Pennsylvania R. Co. (Pa. St.), 3 Atl. 15. Roby, 115 Pa. St. 364, 8 Atl. 593.

³Reese et al. v. Biddle, 112 Pa. St. 72, 3 Atl. 813; Waddell et al. v. ⁴Dealey et al. v. Phil. & R. R. Co. (Pa. St.), 4 Atl. 170.

him from a recovery for injuries sustained through the negligence of the latter in the position in which he placed the pipe. It was said, however: "If the gas-fitter had been ordered by the master mechanic to put up the pipe where and as it was placed, the negligence would have been the negligence of the master." It was further said: "In order to constitute one a vice-principal, he must have general power and control over the business and not mere authority to superintend a certain class of work or a certain gang of men."¹

2348. A car-inspector and a brakeman are fellow-servants where the latter is injured through the negligence of the former in discovering defects in appliances. It was said: "They co-operated in the same business, and the former knows that the employment of the latter is one of the incidents of their common service. If the company employs competent and skilful persons for the purpose of inspection and affords them reasonable opportunities and facilities for the work under proper instructions, the company will not ordinarily be liable for the negligent performance of the work by their employees, to a fellow-employee, unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted."²

2349. Where an employee in a machine shop was injured and the cause of injury was the neglect of the foreman, if this was negligence, in not properly securing the counter-balance, it was held that the negligence, if any, was that of a fellow-servant. It appeared the defendant had furnished proper appliances and they had not been properly used.³

2350. Where a railroad laborer was injured by the breaking of a chain which the foreman of a gang negligently told him to use, when it was in bad repair, it was held he could not recover against the employer, on the ground that the negligence was that of his fellow-servant.⁴

¹ New York, L. E. & W. R. Co. v. Bell, 112 Pa. St. 400, 4 Atl. 50.

³ Faber v. Carlisle Mfg. Co., 126 Pa. St. 387, 17 Atl. 621.

² Phil. & R. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286.

⁴ Kinney v. Corbin et al., 132 Pa. St. 341, 19 Atl. 141.

2351. Where the principal provided suitable materials and sufficient quantity for the construction of the necessary scaffolding, it was held he was not responsible for the consequences of an error in judgment of the foreman in the selection and use of a particular piece which proved to be defective and resulted in an accident whereby plaintiff sustained injuries. It was said: "When it is sought to hold the master liable for the act or neglect of his foreman, the question to be considered is whether the negligence complained of relates to anything which it was the duty of the principal to do. If it does, then the principal is liable, for he must see at his peril that his own obligations to his workmen are properly discharged. If it does not he is not liable, for all his workmen are liable to each other for the consequence of their negligence respectively, and he does not insure them against each other by the mere fact of employment." ¹

2352. The foreman of a gang of men employed in repairing a railroad track is a co-employee of such men.²

2353. When the master intrusts to the superintendent in charge of the excavation the duty of notifying the employees of any latent danger, the foreman in charge of a gang engaged in the work of excavation does not become a vice-principal in the absence of the superintendent so as to render the employer liable for his failure to notify the employees of such danger. When the only possible danger to an employee engaged in making an excavation is such as may arise during the progress of the work, the employer is not bound to stand by during the work to see if a danger arises, it being sufficient if he provides against such danger as may possibly arise and gives the workmen the means of protecting themselves.³

2354. Knowledge by the chief train-dispatcher of the incompetency of a station agent and telegraph operator em-

¹ *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157.

³ *Durst v. Carnegie Steel Co.* (Pa. St.), 33 Atl. 1102.

² *Spancake v. Philadelphia & R. Co.*, 148 Pa. St. 184, 23 Atl. 1006.

ployed by the same company, where the train-dispatcher is without authority to hire or discharge such servant, cannot be imputed to the company.¹

2355. An assistant foreman is a fellow-servant of a workman who works with him.²

2356. A mining boss, required by the act of 1885 (P. S., p. 35) to be employed by the owners of mines, with prescribed duties relative to the care and inspection of mines, is a fellow-servant with the miners at work in the mine, and if the owners have exercised reasonable care in the selection of the mining boss, they are not liable for injuries to workmen resulting from his negligence. And rule 24, article 12, of the above act, which requires employees in mines to give notice of danger to the mining boss, does not make such boss a representative of the owners so as to charge them with constructive notice of information given to him by the workmen, since his duty is the same with or without the provision.³

Rhode Island.

1. Duties Personal to the Master — Vice-principals.

2357. A fireman employed to tend an engine fire was called upon by the engineer to assist in throwing on a belt. The fireman was injured by the belt. Upon the question whether the engineer and fireman were fellow-servants, it was said: "If the fireman was placed under the engineer as his superior and this superior had a right to give orders in his department, then the engineer must be looked upon as a representative of the master. If the person here injured had been an inferior servant and had been injured by the negligence of a superior servant in the same department, that is, if he had been placed under a superior fireman by

¹ Reiser v. Pennsylvania R. Co., 152 Pa. St. 38, 25 Atl. 175. Lewis v. Seifert, 116 Pa. St. 628, distinguished.

² McGinley v. Levering et al., 152 Pa. St. 366, 25 Atl. 824.

³ Lineoski v. Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577.

whose negligence he had been injured, the case would be different, and it might then be argued that he must have known and calculated the risks of such employment. In the present case the fireman was not injured while working in his own particular department, but was injured by the neglect of a superior whose department was more extensive, including his (the fireman's), as a part of it. The engineer not only had a delegated authority or control, but it was the exercise of this delegated authority which was the cause of the injury." ¹

2358. Where an employee was injured by the fall of an elevator caused by the breaking of one of the chains, it was said: "The fact that the defective condition of the chain and ratchets was attributable to the negligence of a fellow-servant of the plaintiff, if the fellow-servant was one whose duty it was to care for them, does not relieve the corporation. It is the duty of the master who furnishes machinery for his servants to operate or work about, to see to it that it is reasonably safe. He cannot divest himself of the duty by devolving it upon others, and if he does devolve it upon others they will simply occupy his place, and he will remain as responsible for their negligence as if he were personally guilty of it himself." ²

2. Fellow-servants.

2358a. Where a brakeman on a freight train after coupling cars attempted to get on the last car, while the train was in motion, by climbing a side-ladder, and in doing so came in contact with a pile of lumber near the track by which he was brushed off and injured, and it appeared the lumber was piled under the direction and charge of the station agent, it was held that the station agent was his fellow-servant and was not a vice-principal. It was said: "He had no authority over the plaintiff; he could neither hire nor

¹ Mann v. Oriental Print Works,
11 R. I. 152.

² Mulvy v. Rhode Island Locomotive Works, 14 R. I. 204.

discharge him, nor was the plaintiff, so far as appears, subject to his orders. Both were engaged in the common employment, serving a common principal, and both were under the same general control. Their duties and authority were different, but they were still fellow-servants.”¹

2359. Where a second foreman in a machine shop whose duties required him, under the directions of his immediate foreman and the superintendent, to repair machinery in the different departments of a cotton factory, was injured by the overseer of one of such departments throwing a barrel from a fourth-story window, striking him, it was held that the master was not liable; that the overseer and such second foreman were fellow-servants.

In answer to the contention that they were engaged in different departments and therefore were not fellow-servants, it was stated that the department theory was impracticable and did not prevail in that state; that the true doctrine was that servants under the same master in the common service were fellow-servants, although they may be engaged in different departments of labor.²

2360. It was held that the engineer of a city steam-roller, who has a fireman under his orders and dischargeable by him, in carelessly starting the roller without warning was but a fellow-servant as to such act and not a vice-principal. The court very fully reviews the different theories as held by courts of different states upon the question “Who are fellow-servants?”

They repudiate the different department theory as recognized in Georgia, Kentucky, Tennessee and Illinois; they repudiate the theory of superior and subordinate as held by many courts, and do not agree with the *Ross Case*. They hold to the doctrine that when the master commits his duty to another, whether a servant or not, such person stands in the place of the master. He is a vice-principal with reference to that duty. They repudiate the test applied by some

¹ *Gaffney v. New York & N. E. R.*
Co., 15 R. I. 456, 7 Atl. 284.

² *Brodeur v. Valley Falls Co.*, 16
R. I. 448, 17 Atl. 54.

courts that the power to hire and discharge help makes one a vice-principal, and held it can only be a test when the question involved is that of selecting or retaining proper servants, and in this respect the servant would clearly represent the master.

They approve of the test briefly stated in *Ell v. Railroad Co.*, 1 N. D. 336, 48 N. W. 222, as follows: "Those cases which preserve the fellow-servant rule in its full integrity bring the facts of each case to the test, not of the rank of the negligent servant, but the character of the negligence from which the accident results. Did the master owe to his servants the duty as master? Answer the inquiry in the affirmative and he cannot escape the careless discharge of that duty by shifting the burden to the shoulders of a servant, however inferior that position may be. It is the negligence of the master. He is liable because that was carelessly done which he was bound to have carefully performed."¹

2361. If a foreman was negligent in ordering his men to go on shoveling sand under a bank after warning that it was dangerous, such negligence would be that of a fellow-servant as to such act and not that of a vice-principal.²

2362. It was held an employee in a foundry could not recover for an injury resulting from the act of his foreman in throwing a box on a pile of iron posts upon the ground; that the foreman as to such act was a fellow-servant. It was said: "The foreman was doing nothing which it was the duty of the master to do, nor was any breach of the master's duty the proximate cause of the injury. The character of the act is the criterion of the liability, not the foreman's power of supervision and control, and of hiring and discharging help."³

¹Hanna v. Granger City Treasurer, 18 R. I. 507, 28 Atl. 659.

³Dimarcho v. Builders' Iron Foundry, 18 R. I. 514, 28 Atl. 661.

²Larich v. Moies Town Treasurer, 18 R. I. 513, 28 Atl. 661.

South Carolina.

1. Rule.

2363. A fireman was injured through the omission of the engineer of the train to promptly stop or check the speed of his train upon discovery that a horse was upon the track. The direct question was presented for the first time in the courts as to the liability of the common master for injuries inflicted upon one of his servants through the negligence of another. It was said that the engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance by each of his several duties. If the fireman neglects his part the engine stands still for the want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, said the judge, it is on the part of the several agents a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another; and, as a general rule, I would say that where there was no fault in the owner, he would be liable only for wages to his servants; and so far has this doctrine been carried, that in the case of a seaman even wages are forfeited if the vessel be lost and no freight earned.¹

2364. An instruction that the rule that exempts a master from liability to a servant for injury caused by the negligence of a fellow-servant applies only where the two servants are engaged in a common business, which their joint efforts are required to accomplish, was held to be too restrictive, for the rule applies to cases where, although the immediate object in which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from negligence of the one is so much the natural and necessary consequence of the employment

¹ *Murray v. South Carolina R. Co.*, 1 McMullen, 385.

which the other accepts, that it must be taken as included in the risks which were considered when his wages were fixed. Thus, the runner of an engine on a railroad takes the risk of negligence in a carpenter employed to repair the road.¹

2365. An employee in a factory was injured by a shuttle being thrown from a loom. The question was whether the person whose duty it was to keep the machines in repair was a fellow-servant or agent of the employer. The trial court charged that his negligence in this respect was chargeable to the master. This, the supreme court held, was stating the law too strongly against the defendant. It was said it does not follow that, because different employees act in different departments of the same general business, they are not fellow-servants. And the fact that one acts in one department and one in another does not impose any greater responsibility on the employer in case of injury by one to the other than when they are both in the same department. The question is, were they co-servants in the general business? and the test is, were they acting under a common employer, and in the same general business? This being established, then they assume the risk of each other's proper performance of duty, the employer being responsible for failure to exercise proper care in the original employment of his servants, and in ascertaining their qualifications after they are in the service.²

2366. Upon a second appeal the proposition was involved whether the employer's duty is fully complied with when he has exercised ordinary care in furnishing suitable machinery and in the employment of competent and careful persons to keep the same in repair, and whether his duty requires him to go further and see that all needful repairs are made. Is a workman employed to keep the machinery of a mill in repair and in good working order a co-laborer or fellow-servant with an operative employed to attend one or more looms as a weaver, in such a sense as to exempt the

¹ Conlin v. City of Charleston, 15 Rich. (S. C.) 201.

² Gunter v. Graniteville Mfg. Co., 15 S. C. 443.

employer from liability for an injury caused by the negligence of the person employed to keep the looms in repair and proper working order? It was said: It is the duty of the master to keep the machinery in proper repair and safe working order, and if he intrusts the performance of this duty to another we see no reason why he should not be liable for injury to one of his servants caused by the negligence of the person employed to perform this duty which it is incumbent upon the master to perform. The test as to whether the employee is the representative of the master is not whether such employee has the same power to employ or discharge hands or to purchase or change machinery; for, while these are some of the duties of the master, they are not all his duties, and hence an employee who is not intrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master, and if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master.¹

2367. Where a section-man was injured while pushing a car upon the track by stepping into an open water-way or ditch across the track, and the question discussed was whether the section-boss was his fellow-servant or a vice-principal in respect to giving him notice or warning of the water-way, the court state in substance that section-masters and servants having the exclusive control over other servants under a common master, including hiring and discharging, in the exercise of those powers are the representative of the master and not mere fellow-servants, and held that the facts of the case did not bring it within the rule. If (they say) the section-master had ordered the plaintiff to do something outside the line of his duty, something not within the scope

¹ *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; *La Sure v. Graniteville Mfg. Co.*, 18 S. C. 276.

of his employment, and in doing so he had been injured, we incline to think the company would have been liable, but hold that there was no inference of negligence upon the facts.¹

2. Duties Personal to the Master — Vice-principals.

2368. Where an employee was injured by the giving way of a tramway upon which he was using a truck, the doctrine stated in *Gunter v. Graniteville Mfg. Co.* was approved. It was further said: If injury is sustained by a servant by reason of the negligence of a mechanic employed to keep the machinery or other appliances in proper repair, the master is liable, notwithstanding the fact that the master may have exercised due care in the selection of the agent to whom such duty is intrusted, because such duty is a duty of the master, and, whether performed in person or by an agent, any negligence in the performance of it is the negligence of the master.²

2369. A locomotive engineer and track-workers were held not fellow-servants where the former was injured by reason of the negligence of one of the latter in relation to his duties as such. This result was declared upon the ground that those servants who are employed to keep in repair the appliances or place of work are performing duties personal to the master, who is responsible for the manner in which they are performed.³

2370. The conductor of a train is the representative of the company, and not a fellow-servant with other employees operating the same train under his orders. The doctrine of the *Ross Case*, 112 U. S. 377, approved. The ground is that he has charge of the train, not that he is a superior in authority.⁴

¹ *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 558.

² *La Sure v. Graniteville Mfg. Co.*, 18 S. C. 275.

³ *Calvo v. Charlotte, C. & A. R. Co.*, 23 S. C. 526.

⁴ *Boatwright v. Northeastern R. Co.*, 25 S. C. 128.

2371. The conductor of a material train, even in the matter of readjusting a switch, was held not a fellow-servant with a laborer on his train, but was a representative of the master. This upon the ground that the duty of the company to provide a suitable and safe track includes the placing of switches.¹

2372. The rule that the duty of keeping appliances in proper repair is personal to the master was applied where, in operating a machine in an oil mill, sacks were used which were dangerous when torn, and an employee was injured in getting his thumb caught in a hole in a sack he was using. The neglect of the employee whose duty it was to repair sacks was held to be chargeable to the master.²

3. Fellow-servants.

2373. Where a fireman upon an engine was injured by contact with cars upon the track which had become detached from a preceding train through the negligence of the conductor, it was held that he could not recover, on the ground that such conductor was his fellow-servant. It was said: "The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for the employees. Such construction would make any negligent misplacement of a switch, any collision of trains, even any negligent dropping of tools about a factory, a breach of duty of providing a safe place. The true idea is that the place and instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that the negligent handling by an employee of the machinery shall not create danger."³

¹ *Coleman v. Wilmington, C. & A. R. Co.*, 25 S. C. 446.

³ *Jenkins v. Richmond & D. R. Co.*, 39 S. C. 507.

² *Carter v. Oliver Oil Co.*, 34 S. C. 211.

South Dakota.

1. Vice-principals.

2373a. Where an employee upon a train was injured by means of the arm of a derrick, not being secured, swinging over the track, and one of the questions raised was that the negligence was that of the station agent, who was a fellow-servant, and it did not appear that he was charged with any duty in respect to the derrick, it was said: "The negligence of a fellow-servant that will relieve a master from liability is the omission by such servant or employee to perform some act which it is made his duty to perform, or the doing of some act in the course of his duty in such a negligent manner as to cause the injury."

The master was held liable upon the ground that it ought to have known, from the length of time the derrick had been in use at that place, of the danger from being unfastened, and in not placing the same under the control of a competent servant, charged with the duty of seeing that it was so properly secured when not in use.¹

Tennessee.

1. Duties Personal to the Master — Vice-principals.

2374. The superintendent of a railroad company through whose negligence in giving train orders a collision resulted, causing injury to an employee, was held to be a vice-principal.²

2375. Servants who are engaged in a subordinate position and who receive injury, caused by the negligence of other servants occupying a superior position, may recover of the common master. They are not fellow-servants within the rule.³

¹ Gates v. C., M. & St. P. R. Co., 2 S. Dak. 422, 50 N. W. 907.

³ Haynes v. East Tenn. & Ga. R. Co., 3 Cold. 222.

² Washburn v. Nashville & Chattanooga R. Co., 3 Head, 638.

2376. Subordinates under the control of a superior are entitled to hold him as representing the master, and the master is responsible for his incompetency or misconduct.¹

2377. In the employment and control of his subordinates a section-boss acts as the agent of the common superior. Where by reason of his wrongful act or negligence his subordinate is injured, the rule *respondet superior* applies, and the master is liable for damages.²

2378. It was said: "If a yard-master is killed while coupling cars at the request of the engineer, by the negligence of the engineer, it not being a part of the duty of the yardman to couple cars, a recovery cannot be had against the railroad. To entitle to a recovery it must be shown that deceased was in the line of his employment, and met his death by the negligence of a fellow-servant having control of him."³

2379. An engineer in charge of a train is the superior, not the fellow-servant, of a brakeman on the same train acting under his orders.⁴

2380. The conductor of a freight train who by the rules of the company the engineer is bound to obey, and who is accountable for the conduct of the train-men, is a vice-principal and not a fellow-servant of a brakeman who is injured in a collision. The negligence of the engineer, who is the fellow-servant of the brakeman, in violating the time-card of the company, was held not the proximate cause of the collision, where the negligence of the conductor in permitting such violation contributed to such collision.⁵

2. Fellow-servants.

2381. Where two persons are acting in a common employment under the same principal, if one is injured by the

¹ Nashville & Decatur R. Co. v. Jones, Adm'r, 9 Heisk. 27; Louisville & N. R. Co. v. Bowler, 9 Heisk. 866.

² Louisville & N. R. Co. v. Bowler, 9 Heisk. 866.

³ Bradley v. Nashville, C. & St. L. R. Co., 14 Lea, 374.

⁴ East Tenn. & W. N. C. R. Co. v. Collins, 1 Pickle, 227.

⁵ Illinois Cent. R. Co. v. Spence, 93 Tenn. 173, 23 S. W. 211.

negligence, unskilfulness or recklessness of the other, the principal is not liable to the injured party in an action grounded upon such negligence of the employee. This rule was declared and applied where a workman upon a building was injured, caused by the neglect of his foreman in the manner of operating a derrick.¹

2382. The engineer and hands employed upon a locomotive are fellow-servants.²

2383. Where an employee in a nail factory was injured, as was alleged, by the imperfect condition of one of the machines, and the trial court charged that the company would be liable for any injury resulting from the neglect to keep the machine in repair, notwithstanding such failure, of one who stood in relation of fellow-servant to the plaintiff, it was held that this was error; that the authorities seem to be otherwise. (Citing Massachusetts and Maryland cases.)³

2384. The engineer is not the superior, but the fellow-servant, of a brakeman in their relations as members of the crew of a railroad train. The relation of superior and inferior would exist between them where the brakeman is in fact acting under orders of the engineer.⁴

2385. The rule that an employee assumes the risk of the negligence of his fellow-servants applies where the injury results from the negligence of another employee who is the immediate superior of the injured employee, unless the superior servant so far stands in the place of the master as to be charged in the particular matter with the performance of a duty which, under the law, the master owes to the inferior, or unless the injury is occasioned by the direct order of the superior in a sudden emergency.

The facts were that the fireman of a locomotive was killed by the explosion of its boiler. The negligence charged

¹ *Fox v. Sandford et al.*, 4 Sneed (Tenn.), 36.

² *Nashville & Chattanooga R. Co. v. Elliott*, 1 Cold. (Tenn.) 611.

³ *Knoxville Iron Co. v. Dodson*, 7 Lea, 367.

⁴ *Nashville, Chattanooga & St. L. R. Co. v. Wheless*, 10 Lea, 741.

was the failure of the engineer to come thirty minutes before the starting of the train as required by the rules.¹

2386. Several employees of a railroad company, though of different grades, when employed in a common service are fellow-servants. Hence an engineer of a passenger train and a brakeman of a freight train of the same company who is ordered by the conductor of his train to go along the line of the road to display danger signals to the passenger train for the purpose of bringing the train safely into the depot are fellow-servants.²

2387. An employee was injured by falling from a railroad trestle. Designing to descend from an upper to a lower bent, he caught a hanging rope which the foreman by mistake informed him was fastened and he fell to the ground. This rope was used to lower tools. There were other ropes which the employees were accustomed to use. There was no proof that the plaintiff was ordered to descend or that the foreman knew that he intended to do so, or that any duty was assumed or imposed upon the foreman to provide safe means of descent by ropes. It was held that the accident happened from personal negligence of the foreman, for which the master is not liable, and the court should have stated the distinction between personal and official negligence of a superior servant.³

2388. Where the regulations of a railroad company provide that, in case a train becomes divided, the front brakeman shall go to the rear of the front division and signal the engineer which way to move, and the engineer shall obey the signals, and also that, in case the conductor is cut off from the train, the right of command shall devolve on the engineer, the engineer and the brakeman are only fellow-servants in case of the breaking of the train, when the engineer

¹ Nashville, C. & St. L. R. Co. v. Handman, 13 Lea, 423.

³ Louisville & Nashville R. Co. v. Lahr, 2 Pickle, 335.

² East Tenn., V. & G. R. Co. v. Rush, 15 Lea, 145.

does not assume command and both are acting in the line of their separate duties.¹

2389. An instruction in such case, that being subject to the orders of the engineer is the same in fact as acting under his orders so as to render the company liable for an injury to the brakeman from the engineer's negligence, is erroneous.²

2390. Where a brakeman in violation of the rules of the company undertakes to make a coupling of a moving train, and is injured, he cannot recover for the injury. And it is immaterial that he was ordered to make the coupling by the engineer of the train. The engineer is a fellow-servant with the brakeman on the same train, the conductor being in charge thereof.³

2391. A miner was suffocated by the burning of buildings over the entrance of the mine. It was claimed the cause of the fire was the negligence of the engineer in control of the engine and engine-house. The question was, if his negligence was conceded, were the deceased and the engineer fellow-servants.

The court say: "The common-law rule has been limited in some respects; that the first of these limitations is that if a servant has been injured by the negligence of a superior servant, having the right to control, and while executing the order of such superior, about a matter in which the superior has a right to control, then such superior servant is to the inferior a vice-principal and his negligence is that of the master.

"The mere superiority of work or wages does not determine the liability of the master for the negligence of such superior servant. In order to charge the master the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of a

¹Louisville & N. R. Co. v. Martin, 3 Pickle, 398, 10 S. W. 772.

³East Tennessee, V. & G. R. Co. v. Smith, 89 Tenn. 114, 14 S. W.

²Louisville & N. R. Co. v. Martin, 1077.

³Pickle, 398, 10 S. W. 772.

duty towards the inferior servant which, under the law, the master owes to such servant.

“In this case the evidence does not show that this engineer was the superior of the deceased, or that the master had intrusted the discharge of any duty to this engineer with respect to the deceased. They were servants of the common master and neither had any control over the other. This made them fellow-servants. It has been insisted that the deceased and this engineer were in different and distinct departments of the service, and that for this reason the fellow-servant rule does not apply. This different-department rule has not been adopted in this state; the weight of authority is against it. The point of consociation is the idea underlying this limitation. This rule has not been extended by us beyond railroad corporations, and we are not disposed to extend it further than to the class of employments to which it has been heretofore limited.”¹

2392. The mere fact that one is employed as foreman by the master and points out the work to be done by a servant does not constitute such foreman a vice-principal for whose negligence the master is liable. But the question is whether he stands in the place of the master. The fact that the servant may not have known of the foreman's discharge and that he continued to obey the foreman's orders as such will not render the master liable for the foreman's negligence. But the foreman must have been in fact a vice-principal standing in the place of the master. The jury in such a case should be instructed to distinguish between the foreman's personal negligence and his negligence in the matter in which he stands in the place of the master.²

3. Separate Departments.

2393. Where a trackman or boss was run over by a train while he was upon a hand-car, and the question was as to

¹ Coal Creek Mining Co. v. Davis, 90 Tenn. 711, 18 S. W. 387.

² Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760.

whether the operators of the train were his fellow-servants, it was held that they were not his fellow-servants, on the ground that they were laboring in a separate and distinct branch of the service, between which there was no immediate or necessary connection or association.¹

2394. Where an employee of a railroad company in the discharge of his duties is injured by reason of the negligence of a co-employee of the same company engaged in a separate department, having no immediate connection with that in which the injured party was engaged, the company is liable. This was said where a fireman was killed by the explosion of the boiler of a locomotive.²

2395. A telegraph operator at a way station, who has no control of or connection with the running of railway trains, except as a medium through which orders from the superintendent's office are communicated to servants of the company in charge of its trains, is not a fellow-servant of a conductor having charge and control of a railway train, in the sense that the latter assumes risks of injuries caused by the former's negligence. The operator in such case is not only engaged in a different department of the common service, but, as the arm or mouth-piece of the superintendent of the trains, is in a sense a vice-principal and the conductor's superior.³

Texas.

1. Duties Personal to the Master — Vice-principals.

2396. The foreman in the repair department of the shops of a railroad company, with power to employ and discharge hands, is not the fellow-servant of those under his control, but the representative of the master.

The facts were that the foreman ordered the plaintiff, a car-repairer, to go under a car and make repairs, and prom-

¹ Washburn v. Nashville & Chattanooga R. Co., 3 Head, 638.

³ East Tenn., V. & G. R. Co. v. De Armond, 2 Pickle, 73.

² Nashville & Decatur R. Co. v. Jones, 9 Heisk. 27.

ised him to watch and see that he was not injured, and asked two other employees also to watch. The plaintiff was injured by a car striking the one under which he was working.

This ruling was made upon the ground that the plaintiff was under the immediate control of the foreman, who had the power to employ and discharge the servants under him, and therefore such foreman is to be treated as the representative of the company, and not the fellow-servant of the plaintiff.¹

2397. A section-foreman who has full power to employ and discharge the laborers working on his section is not their fellow-servant.²

2398. Where the plaintiff was employed to manage a stationary engine used in drilling wells for a railroad company, and the person who employed plaintiff had charge of the drill in the capacity of foreman, and was authorized to apply the steam and set the machinery in motion by means of ropes connected with the engine, and was also authorized to employ and discharge plaintiff, and there was evidence, though disputed, that plaintiff was subject to his orders, and the plaintiff was injured by the foreman's negligence in starting the machinery, it was held that the foreman and plaintiff were not fellow-servants.³

2399. The foreman of a section-gang, having authority to employ and discharge hands and to direct their work, is a vice-principal of the railroad company without regard to the character of the work he may perform; and where, while riding on a hand-car with his men, he himself gets off to throw a switch for the passage of the car, and his negligence in doing the act causes injury to a man under his control, the company cannot avoid liability on the ground that in this particular work he was acting as the fellow-servant, since in Texas there is no distinction, as regards

¹ Missouri Pac. R. Co. v. Williams, (Tex.), 16 S. W. 1025, 81 Tex. 685, 75 Tex. 4, 12 S. W. 835. 17 S. W. 511.

² Gulf, C. & S. F. R. Co. v. Wells ³ Nix v. Tex. Pac. R. Co., 82 Tex. 473, 18 S. W. 571.

the master's liability for the vice-principal's negligence, between the latter's acts in performing the non-assignable duties intrusted to him specially and those original acts which he and the servants under him are in the habit of indiscriminately performing.¹

2400. Where a car-inspector negligently fails to discover that a freight-car running on the road is in bad order, and to report it for repairs, the company is liable for injuries to a brakeman caused by the defect. The car-inspector, though engaged in inspecting cars for other companies, is not the fellow-servant of the brakeman in the employ of a railroad company using the cars.²

2401. An employee charged by the master with the duty of keeping in repair the railway track is not a fellow-servant with the employees operating trains on such track. Therefore, where a switchman was killed at night by stepping from the engine as it approached a switch he was required to operate, upon a pile of cinders which had been left near the track through the negligence of the track foreman, the company was held liable.³

2402. The master-mechanic in charge of the round-house of a railroad company, with power to employ and discharge hands, is a vice-principal, and notice to him of defects in the round-house is notice to the company.⁴

2403. An engineer is not a fellow-servant of train-dispatchers and telegraph operators.⁵

2403a. The same employee cannot be both a vice-principal and a fellow-servant. If a vice-principal, his acts are those of the master, whatever may be the nature or character of the duties he is engaged in performing.⁶

¹ Sweeney v. Gulf, C. & S. F. R. Co., 84 Tex. 433, 19 S. W. 555.

⁴ Missouri Pac. R. Co. v. Sasse (Tex. App.), 22 S. W. 187.

² St. Louis, A. & T. R. Co. v. Putnam, 1 Tex. App. 142, 20 S. W. 1002.
 Railway Co. v. Keenan, 78 Tex. 394, 14 S. W. 668, followed.

⁵ Missouri, K. & T. R. Co. v. Hogan (Tex.), 32 S. W. 1035.

⁶ Texas & Pacific R. Co. v. Reed (Tex. App.), 32 S. W. 118.

³ Missouri Pac. R. Co. v. Bond, 2 Tex. App. 104, 20 S. W. 930.

2. Fellow-servants.

2404. Plaintiff and his wife were keeping a boarding-car in connection with a construction train, and just as the car was about to be moved she was standing with the conductor near the door to see where it would be placed. The car started suddenly, and she was thrown upon the track. It appeared the wife was working for her husband, who was boarding the company's men under an agreement that the company should retain their board and pay it to the plaintiff. It was held that the wife and the engineer were not fellow-servants.¹

2405. A foreman upon a railroad track and employees operating a train on the road are fellow-servants in the sense that precludes the former from a recovery from the company for injuries resulting from the negligence of the latter.²

2406. A brakeman on a freight train is a fellow-servant with one having general charge of the company's freight business in the locality of the accident, with authority to employ and discharge hands in connection with such business. The fact that employees are engaged in different and distinct departments of the service does not take them out of the rule which exempts the master from liability for injuries resulting to one servant from the negligence of his fellow-servant. (Following *Railway Co. v. Welch*, 72 Tex. 296, 10 S. W. 529, and *Dallas v. Railway Co.*, 61 Tex. 196.)³

2407. A locomotive engineer and fireman are fellow-servants.⁴

2408. The road-master in charge of a working train and a working party, with power to employ and discharge the men, is a fellow-servant of a section-hand riding thereon under his direction, but not employed under the immediate eye of the road-master, and such a section-hand cannot recover for an injury received in a collision caused by the road-master's negli-

¹ *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288.

² *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 10 S. W. 529.

³ *Galveston, H. & S. A. R. Co. v. Farmer*, 73 Tex. 85, 11 S. W. 156.

⁴ *Gulf, C. & S. F. R. Co. v. Blohn et al.*, 73 Tex. 637, 11 S. W. 869.

gence. This rule was based upon the ground that as to the operation of the train he was performing the duties of a servant the same as the conductor. It was said the case of *Railway Co. v. Williams*, 12 S. W. 835, was distinguished, and the court was not prepared to recede from that ruling; that in the present case at the time of the accident plaintiff was not employed under the immediate eye of the road-master.¹

2409. A railroad employee working in a bridge gang is the fellow-servant of a workman in the transportation department, although they have no duties in common and are under the direction of independent superintendents.²

2410. Where cars standing on tracks, used exclusively for the storage of cars needing repair, are moved by car-repairers so close to the switch that one of them is struck by a switch-engine properly running on the adjacent track, thereby driving such cars against and killing one of such car-repairers while at work, the negligence of the repairers is the proximate cause of such death, and the railroad company is not liable therefor. Such car-repairers and the engineer of the switch-engine are fellow-servants.³

2411. A person employed by a railroad company to nail upon its bridges the number thereof, and the workmen upon the train which carries such person from bridge to bridge, are fellow-servants.⁴

2412. The foreman of a switch-yard having power of discharging employees is not their fellow-servant.⁵

2413. Where an engine-wiper and night-watchman was injured while attempting to couple cars by order of defendant's yard-foreman, who was in charge of the engine, it was said: Though the foreman was not qualified to operate the engine, and plaintiff did not know it, no recovery could be

¹Galveston, H. & S. A. R. Co. v. Smith, 76 Tex. 611, 13 S. W. 562.

²St. Louis, A. & T. R. Co. v. Welch, 72 Tex. 298; International & G. N. R. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219.

³Tex. & Pac. R. Co. v. Cumpston, 4 Tex. App. 25, 23 S. W. 47.

⁴Austin & N. W. R. Co. v. Beatty, 6 Tex. App. 650, 24 S. W. 934.

⁵Texas & Pac. R. Co. v. Reed (Tex.), 31 S. W. 1058.

had except for the foreman's negligence in handling the engine. The foreman was the plaintiff's fellow-servant. Since it does not follow that the foreman had authority to discharge plaintiff, the exercise of an act by the foreman, which would certainly be that of a fellow-servant, is not to be regarded as that of the principal.¹

2414. In an action by a railroad laborer for injuries sustained by the negligence of a temporary foreman who was left in charge during the absence of the regular foreman, where the evidence is confused as to the powers of the temporary foreman, the court clearly and specifically charged that to sustain a finding for the plaintiff the evidence must show that the temporary foreman had full control of the work and full power to employ and discharge men. It was held such was the law.²

3. Statute.

Chapter 91, Laws of 1893.

2415. An act to define who are fellow-servants and who are not fellow-servants, and to prohibit contracts between employer and employees based upon contingency of the injury or death of the employees, limiting the liability of the employer for damages.

SEC. 1. Be it enacted by the legislature of this state, That all persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver, manager or of any person controlling or operating such corporation, who are intrusted by such corporation, receiver, or person in control thereof, with the authority of superintendence, control or command of other persons in the employment of such corporation, or receiver, manager or person in control of such corporation, or with the authority to direct other employee in the perform-

¹Gulf, C. & S. F. R. Co. v. ²St. Louis, A. & T. R. Co. v. Schwabbe, 1 Tex. App. 573, 21 S. W. Lemon, 83 Tex. 143, 18 S. W. 331.
706.

ance of the duty of such employee, are vice-principals of such corporation, receiver, manager or person controlling the same, and are not fellow-servants of such employee.

SEC. 2. That all persons who are engaged in the service of such railway corporation, receiver, manager or person in control thereof, and who, while so employed, are in the same grade of employment and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such corporation, receiver, manager, or person in control thereof, with any superintendence or control over their fellow-employees, or with the authority to direct any other employee in the performance of any duty of such employee, are fellow-servants with each other; provided, that nothing herein contained shall be construed as to make employees of such corporation, receiver, manager, or person in control thereof, fellow-servants with other employees engaged in any other department or service of such corporation, receiver, manager, or person in control thereof. Employees who do not come within the provisions of this section shall not be considered fellow-servants.

SEC. 3. No contract made between the employer and the employee, based upon the contingency of death or injury of the employee, limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding.

SEC. 4. That all laws and parts of laws in conflict herewith are hereby repealed, and particularly the act passed by the Twenty-second Legislature on the subject of fellow-servants, being chapter 24 of the acts of the Twenty-second Legislature.

2416. A brakeman ordered upon a train, afterwards wrecked, but not engaged in operating it, though drawing regular pay, is not a fellow-servant with the engineer as defined by the act of March 10, 1891. Section 2 provides "that all persons working to a common purpose at the same

time and place, neither being intrusted with any control over their fellow-employees, are fellow-servants."¹

2417. It was held that the act of March 10, 1891, section 1, providing that "All persons engaged in the service of any railway corporation, who are intrusted by such corporation with authority to direct any other employee, are vice-principals of such corporation, and are not fellow-servants of such employees," applies to railroad operatives employed by a receiver of a railroad corporation.²

2418. The foregoing case was reversed by the supreme court, and it was held that the statute did not apply to the employees of receivers of a railway corporation. A brakeman and conductor on the same train in the employ of a receiver are fellow-servants in the absence of authority by the conductor to employ and discharge brakemen.³

2419. The act of March 10, 1891, declaring certain employees of railway corporations to be vice-principals, does not apply to street railway corporations.⁴

2419a. That the engineer upon a train gives the signals to put on brakes does not make him a vice-principal as to a brakeman under the statute.⁵

2419b. A car-repairer working in a separate yard is not a fellow-servant of a hostler or of a switchman under the statute.⁶

2419c. Under section 2 of the statute, in order to constitute employees fellow-servants they must be engaged in the same service, in the same grade of employment, working together at the same time and place and to a common purpose. Hence, an engineer and a switchman, members of a switching crew and engaged in the work under a common

¹ Galveston, H. & S. A. R. Co. v. Groethe (Tex.), 31 S. W. 196; Riley Waldo (Tex. App.), 26 S. W. 1004. v. Galveston City R. Co. (Tex. App.),

² Campbell et al. v. Cook (Tex. App.), 24 S. W. 977. 35 S. W. 826.

³ Campbell et al. v. Cook, 86 Tex. (Tex.), 36 S. W. 432. 630, 26 S. W. 486.

⁴ Austin Rapid Transit R. Co. v. Keller (Tex. App.), 32 S. W. 847. ⁵ Texas Cent. R. Co. v. Frazier

foreman, though employed and discharged by different officers, were fellow-servants.

The proviso in section 2 of the statute, that "nothing herein contained shall be so construed as to make employees . . . fellow-servants with other employees engaged in any other department of the service," has reference to the subdivision of the business and restricts the construction of the words "engaged in the common service," so as to include those only engaged in the same subdivision of the work, and not all serving the same or common employer in the same kind or branch of work.¹

2419d. A station agent is not a fellow-servant with operatives upon trains under the statute.²

2419e. An engineer and hostler are not fellow-servants under the statute.³

Utah.

1. Duties Personal to the Master — Vice-principals.

2420. The superintendent of a mine who has general and entire charge of the work, employs and discharges workmen, and directs their duties and employment, is not a co-employee with common laborers in the mine whose duty it is to obey the orders of such superintendent.⁴

2421. A brakeman is not the fellow-servant of a car-inspector. The reason for this ruling is evidently that of the Illinois courts, as it is said "that in order to constitute servants of one master fellow-servants within the rule *respondere superior* they must be engaged in the same line of work, be under the control of the same foreman, be employed and discharged by the same head of the department in which they are at work; that they labor together in such personal relation that they can exercise an influence upon each other promotive of proper caution in respect of their mutual

¹ *Gulf, C. & S. F. R. Co. v. Warner* (Tex.), 35 S. W. 364.

² *Gulf, C. & S. F. R. Co. v. Calvert* (Tex. App.), 32 S. W. 246.

³ *Texas & Pacific R. Co. v. Leighty* (Tex. App.), 32 S. W. 799.

⁴ *Reddon v. Union Pac. R. Co.*, 5 Utah, 344, 15 Pac. 262.

safety; that they shall be at the time of the injury directly co-operating with each other in the particular business in hand, or that their mutual duties shall bring them into habitual consociation, as that they may exercise an influence upon each other promotive of proper caution, and to be so situated in their labor to some extent as to supervise and watch the conduct of each other as to skill, diligence and carefulness.”¹

2422. One who is employed by a railroad company under a foreman to make repairs in its repair shops and in cars standing in its yards is not a fellow-servant of a switchman, who, under orders of the yard-master, directs the movements of cars in the yards.²

2423. A railroad foreman, having full charge of the loading of cars in a gravel pit, with power to hire and discharge laborers and to direct their work, is not a fellow-servant of such laborers. It was said: “A servant does not assume risks and dangers caused by the negligent act of another servant under whose orders he works, and who in a legal sense stands as the master’s representative in rendering unsafe and dangerous work which the superior servant orders the employee to perform.”³

2424. The foreman of a railroad switching crew was held not a fellow-servant with one of the helpers who was subject to his orders. The reasoning stated in the foregoing case was applied.⁴

2. Fellow-servants.

2425. Where an employee knew of a crevice in a bank of earth and failed to notify another working thereat, and having no authority or control over the latter, it was held

¹ Daniels v. Union Pac. R. Co., 6 Utah, 357, 23 Pac. 762.

³ Andreson v. Ogden, U. R. & D. R. Co., 8 Utah, 128, 30 Pac. 305.

² Pool v. Southern Pac. R. Co., 7 Utah, 303, 26 Pac. 654; Webb v. Denver & R. G. W. R. Co., 7 Utah, 363, 26 Pac. 981.

⁴ Armstrong v. Oregon S. L. & U. N. R. Co., 8 Utah, 420, 32 Pac. 693.

they were fellow-servants, and the latter could not recover from the common master for injuries received by the caving in of the bank.¹

Vermont.

For rule in Vermont, see page 1204.

Virginia.

1. Duties Personal to the Master — Vice-principals.

2426. Those servants whose duty it is to keep a railroad track in repair and guard the track to observe that it is safe are supervising agents of the company, charged with the performance of duties which by law it is incumbent on the company to perform. It was held, where the question was as to information which the section-master and track-walker had of the danger attending the situation of a rock in an embankment at the side of a cut, that it was notice to the company.²

2427. Where an employee of a railroad company received an injury while executing his duties as inspector of cars, through the negligence of the engineer of a shifting-engine employed by the same company, it was held that the two employees, being engaged in different departments, were not fellow-servants in the sense which would relieve the employer from liability for an injury suffered by one through the negligence of the other.

The ground for this ruling is that the employees were engaged in different departments of the service, that is, they were not co-employees, thrown together in the performance of a common duty, and having opportunity to observe and judge of the habits and qualifications of each other.³

2428. A fellow-servant or co-employee for whose negligence the company is not liable is one who is in the same common employment, that is, in the same shop or place with or having no authority over the one injured, and who is no more charged with the discretionary exercise of powers and

¹Allen v. Logan City, 10 Utah, 279, 37 Pac. 496.

³Richmond & D. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211.

²Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.

duties imperatively resting upon the master than the injured party. Where, however, the person is placed in charge of the construction or repair of machinery, the dispatching of trains, the maintenance of ways, etc., he is not a fellow-servant with those under him or with those in the different departments of the service. He is the agent of the company, who has assumed through him the performance of duties which are absolute and imperative, an omission or negligent performance of which the latter will nowise excuse.

It was held that a section-master in charge of a squad of hands altering and repairing the road could in no sense be regarded as a fellow-servant in the same common employment or department of service with the person injured, who was a train-hand, a brakeman.¹

2429. Where a brakeman was killed in the same accident referred to in the preceding case, and it appeared that the accident was caused by the neglect of the section-men, whose duty it was to repair the track, and who failed to give warning to the approaching train of the dangerous condition of the road, it was held that the negligence of such employees was the negligence of the company, and that plaintiff's intestate was not a co-employee.²

2430. The conductor of a train is a vice-principal where a brakeman on the same train is injured through his negligence.³

2431. Where a locomotive engineer left his engine to the management of an inexperienced fireman while a flying switch was being made with such engine, under the direction of the conductor, and a brakeman was killed by reason of the improper management of the engine by such fireman, the railroad company was held guilty of negligence. This

¹ *Moons, Adm'r, v. Railroad Co.*, 78 Va. 745. *Ayers v. Richmond & D. R. Co.*, 84 Va. 679, 5 S. E. 583; *Richmond &*

² *Torians, Adm'r, v. Richmond & A. R. Co.*, 84 Va. 192, 4 S. E. 339. *D. R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990; *Richmond & D. R. Co. v.*

³ *Johnson's Adm'r v. Richmond & A. R. Co.*, 84 Va. 713, 5 S. E. 707; *Brown*, 89 Va. 749, 17 S. E. 132.

upon the ground that the conductor was present and knew of and permitted the performance of the engineer's duties by such fireman, and it was therefore immaterial that the brakeman and the engineer were fellow-servants. It was a case of concurring negligence.¹

2432. Where a hostler was injured while obeying the directions of his superior, the yard-master, and relying upon his assurance of safety, it was held that the yard-master was such a representative of the company, even as to such assurance, as to render it liable for injuries sustained by such hostler.²

2432a. The foreman in charge of a stone quarry, having general superintendence over the men and complete authority to make and abrogate rules governing the method of work, is a vice-principal of the men working under his control.³

2. Fellow-servants.

2433. The engineer on one locomotive and the engineer upon another, in the employ of the same defendant, are fellow-servants, and one cannot recover from the common master for injuries received through the negligence of the other. The rule was stated: "All who serve a common master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, although it may be in different grades and departments of it, are fellow-servants who take the risk of each other's negligence."⁴

Washington.

1. Duties Personal to the Master — Vice-principals.

2434. A yard-boss who has entire charge of a mill-yard, hires and discharges workmen and superintends the piling

¹ Norfolk & W. R. Co. v. Thomas, Adm'r, 90 Va. 205, 17 S. E. 884.

³ Richmond Granite Co. v. Bailey (Va.), 24 S. E. 232.

² Norfolk & W. R. Co. v. Phelps, 90 Va. 665, 19 S. E. 652; Norfolk & W. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496.

⁴ Norfolk & W. R. Co. v. Donnelly, Adm'r, 88 Va. 853, 14 S. E. 692.

of lumber is not a fellow-servant of such workmen, but represents the master, and the master is liable for the death of one of such workmen killed by the falling of lumber negligently piled under the direction of the yard-boss.¹

2. Fellow-servants.

2435. A person employed as a head-carpenter in a saw-mill to make repairs around the building and vessel used in connection therewith is, while moving lumber in the mill, the fellow-servant of the sawyer working in the same premises. The court adheres to the rule that to make two employees fellow-servants they must be engaged in the same common employment and in the same department of the service, and act under the same immediate direction; and held that the circumstances were such that the employees herein engaged were within the rule.²

2436. One appointed by a mining company, as required by law, to examine the mine daily for fire-damp, with authority to forbid the men from working in any part of the mine which may seem unsafe, is not a vice-principal of the company so as to make the latter liable for his negligence in opening a lamp to light his pipe while engaged in conversation in the mine. He had no control over the men; he was not engaged at the time of the accident in performing duties of a vice-principal, if he were conceded to be such.³

2437. A foreman who has no other duties to perform than to load cars, and not shown to have any authority to direct the men under him to assist an engineer in moving cars, cannot bind the company by such direction so as to make it the duty of the men to obey him, and when they did obey him they assumed the risk. The engineer and fireman of a locomotive and a common laborer, all of whom are engaged in moving cars from a spur track, are fellow-servants.⁴

¹ Zintek et al. v. Stimson Mill Co., 9 Wash. 395, 32 Pac. 997, 37 Pac. 340. ³ Morgan v. Carbon Hill Coal Co., 6 Wash. 577, 34 Pac. 152.

⁴ Watts v. Hart et al., 7 Wash.

² Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830, 178, 34 Pac. 423.

2438. A substitute hired by an employee stands in the employee's place, with all its responsibilities and liabilities, so far as the master is concerned, and a fellow-servant with the employee is a fellow-servant with the substitute.¹

West Virginia.

1. Duties Personal to the Master — Vice-principals.

2439. Where an engineer upon one train of a railroad company was injured by the negligence of the conductor of another train of the company, running in an opposite direction, or by the fault of one of the company's telegraph operators in transmitting a telegraphic order to such conductor, such engineer being wholly without fault or the means of preventing such negligence or of avoiding its consequences, it was held that such engineer was not the fellow-servant of said conductor nor of the telegraph operator in regard to acts and telegraphic orders between the operator and the conductor, within the rule which exempts the company from liability for the negligent acts of fellow-servants or persons engaged in the common service, and the company was liable for an injury to such engineer caused by the negligence of such conductor or the operator in such manner.

This conclusion is claimed to find support in those cases where the rule of subordinate and superior prevails, including the *Ross Case* in the federal court, and also to be within the principle of the cases which hold that servants working in different departments of the same business are not fellow-servants.²

2440. Where a company puts a foreman in charge of a gang of laborers with the power to discharge them subject to the approval of the superior, and makes it his duty to see that these laborers faithfully perform their duties, such foreman must, in the performance of all his duties to those labor-

¹ *Anderson v. Guineau*, 9 Wash. 304, 37 Pac. 449.

² *Madden v. Railway Co.*, 28 W. Va. 618.

ers under him, be regarded as a representative of the railroad company; and if through his neglect of duty one of these laborers in the performance of his duty is injured, he may recover of the railroad company the damages he has sustained, caused by the negligence of such foreman.¹

2441. The rule was stated that where a railroad company puts a superintendent, foreman, or other employee, in its place to discharge some duty which it owes to its servants or employees, as to such duty such superintendent or other employee is not a co-servant, but the representative of the company, and as to such duty the company is bound by the acts and omissions of such middleman the same as though the acts had been done or omitted by the company itself. Whenever such company delegates to another the performance of a duty to its servants which it has impliedly contracted to perform itself, or which rests upon it as an absolute duty, it is liable for the manner in which the duty is performed by the middleman whom it has selected as its agent; and to the extent of the discharge of these duties by the middleman, he stands in the place of the company, but as to all other matters he is a co-servant. The question in such case is not whether the company reserved to itself any oversight or discretion, but whether it did in fact clothe the middleman with power to perform its duties to the servant injured.²

2442. It is the duty of a railroad company to guard its employees from injuries resulting from unsound, unsafe and defective engines, cars and appliances by having the same continually inspected by persons competent to perform that duty, and the negligence of such inspector in the discharge of his duty is the negligence of the company.³

2443. It was held that the conductor of one train and a brakeman upon another were not fellow-servants. The facts

¹ *Criswell v. Pittsburg, St. L. & C. R. Co.*, 30 W. Va. 798, 6 S. E. 31.

² *Riley v. Railway Co.*, 27 W. Va. 145.

³ *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. 432;

Cooper v. Railroad Co., 24 W. Va. 38.

were that the conductor left his train stationary upon the main track at a time when another train was due and expected, which resulted in a collision, injuring the brakeman upon the expected train.

The reasoning of the court is that, the conductor being a superior of the brakeman, though without authority or control over him, and representing the master in the charge and control of his own train, he is a vice-principal. This result is attempted to be justified by the ruling in the *Ross Case* in the federal court.¹

2. Fellow-servants.

2444. It was held that an engineer of a switch-engine working in a railroad yard, and one employed in such yard to take the numbers of cars, where the latter was injured through the alleged negligence of the former, were fellow-servants. The reasoning was "that the company had not delegated to the engineer any authority to discharge a duty it owed to the deceased, within the meaning of the rule. The one was not superior or subject to the control of the other. Neither was a middleman or vice-principal to the other, so as to come up to the standpoint to fix liability on the company under the principles of *Madden v. Railway Co.*, 28 W. Va. 610. They were simply two servants working for a common master, with no authority vested in either as to the other. The engineer had no control over the deceased. The fact that the work of the two was dissimilar makes no difference."²

2445. An engineer and a car-repairer were held to be fellow-servants where the latter was injured by the alleged negligence of the former. The reasoning was that the engineer was in no manner the superior officer of the car-repairer, and it was not alleged that he had any right to

¹*Daniel v. Chesapeake & O. R. & O. R. Co.*, 37 W. Va. 502, 16 S. E. Co., 36 W. Va. 397, 15 S. E. 162. 435.

²*Beuhrings, Adm'r, v. Chesapeake*

command or control him. They were working for a common master, and although working in different capacities and under different foremen they must be regarded as fellow-servants.¹

2446. It was said: "The employees of a railroad company oftentimes occupy not only a dual but a threefold position towards each other, according to the duties they are called upon to perform, to wit, that of superior or master, co-ordinate or fellow-servant, inferior or servant. For instance, in running the train the conductor is the superior of the engineer, and in that particular he represents the master. In the separate management of the engine and the train from the engine back, they are co-ordinates or fellow-servants, each being independent in his own sphere; and in permitting the fireman or other persons to manage the engine in his stead, the engineer is the superior of the conductor, discharging a non-assignable duty delegated to him by the master or company. Where the injury is caused by an employee acting in the discharge of his duty which renders him inferior to or co-ordinate with the injured employee, the master or company is not liable, but where he acts in a superior position the master is liable."²

Wisconsin.

1. Rule.

2447. Whether the relation of co-employee or fellow-servant exists between the different employees engaged in the same business for the same employer is not determined by the rank or grade of either servant, but by the character of the act being performed by them. If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employee is not a servant but an agent, but as to all other acts he is a servant.³

¹ *Unfried v. Balt. & Ohio R. Co.*, 34 W. Va. 260, 12 S. E. 512.

² *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

³ *Dwyer v. American Express Co.*, 82 Wis. 307, 52 N. W. 304; *Heine v. Railway Co.*, 58 Wis. 525; *Howland v. Railway Co.*, 54 Wis. 226;

2448. An allegation that the plaintiff was injured by the negligence of one who was the agent and manager of the company's office does not, in the absence of allegations stating his powers and duties, create the presumption that he is a vice-principal. Such presumption is negatived where the complaint states that the act causing the injury was done by such agent negligently and carelessly driving a team drawing goods to and from such office.¹

2449. The employees of one company running trains on the track of another are not their fellow-servants.²

2450. An agent or an employee who may be a vice-principal as to the transaction of the general business of the defendant at a given point is still but a fellow-servant of other employees where he is engaged in performing such duties as pertain to a servant. Thus, where an agent for an express company at a city, while driving the company's wagon in taking freight from the company's office to trains, caused the injury to another employee, as it was alleged, by careless driving, it was held that as to such acts he was but a mere servant.³

2451. Where it is a part of the duties of employees to select from materials furnished by the master some for use of other servants, and injury is caused by the selection of such as are unfit, there being sufficient that are fit and suitable to select from, such servants so selecting the material are performing the duties of servants and are fellow-servants with the employees who are to use them, though not at work at the time. So held where servants selected a plank to be used as a bridge to carry charcoal from a car to a shed, which, owing to some defect, broke.⁴

Hoth v. Peters, 55 Wis. 405; Hulehan v. Railway Co., 68 Wis. 520; Brabbitts v. Railway Co., 38 Wis. 289; Schultz v. Railway Co., 48 Wis. 375; McClarney v. Railway Co., 80 Wis. 278.

² Phillips v. C., M. & St. P. R. Co., 64 Wis. 475.

³ Dwyer v. American Express Co., 82 Wis. 307.

⁴ Van den Heuvel v. National Fur Co., 84 Wis. 636.

¹ Dwyer v. American Express Co., 55 Wis. 453.

2. Duties Personal to the Master — Vice-principals.

2452. A railroad brakeman was injured while coupling his section of a train, and there was evidence tending to show that the injury was caused by the use of a defective switch-engine, and that the foreman of the shops, whose duty it was to make repairs, had notice of the defect. It was held that the case came within the rule that the duty to furnish and maintain appliances reasonably safe for the use of workmen was personal to the master, and that such foreman was not a fellow-servant of the injured employee.¹

2453. The same rule was held to be applicable where a servant was injured by a defective brake-rod. It was said: "The neglect or misconduct of the officer or employee whose duty it is to attend to those things, and who *pro hac vice* represents the company in the matter, is the negligence or misconduct of the company itself."²

2454. It is the duty of a railroad company to keep its tracks free from obstructions which will render the moving of cars along them unnecessarily hazardous to its employees charged with that work, and when one such was injured while pushing a car by a pile of lumber near the track, it was held that, as it appeared that such neglect was attributable to the yard-master who had control of the yard, his negligence was the negligence of the master and not that of a co-employee.³

2455. Where one of a crew working with a pile-driver was injured by its defective condition from want of repairs, and it appeared that the foreman in charge had full authority in the premises to cause the repairs to be made, it was held that his neglect in the matter was the neglect of the master, and not that of a co-employee.⁴

2456. A person employed as a detective was injured while riding upon a hand-car at the direction of the company.

¹ Brabbitts v. C. & N. W. R. Co.,
38 Wis. 289.

³ Bessex v. C. & N. W. R. Co., 45
Wis. 477.

² Smith v. C., M. & St. P. R. Co.,
42 Wis. 520.

⁴ Schultz v. C., M. & St. P. R. Co.,
48 Wis. 375.

The defective manner in which planks were laid at a crossing and the speed at which the car was moved were the alleged causes of negligence. It was held that he did not assume the risk of injury, either from the unfitness of such means of conveyance or by any negligence of those running the car. They were not his fellow-servants.¹

2457. A person employed by a city to superintend the construction of a cistern, and who in turn employed the workmen to construct the same, is not a fellow-servant of such workmen. The court used very emphatic language in asserting that he was a vice-principal, yet failed to distinguish upon any line of reason why the exception from the general rule applied in other cases was made.²

2458. The negligence of a section-foreman to keep the track clear of obstructions is the negligence of the company. He is not a fellow-servant of those whose duties require the use of the track.³

2459. Where a foreman whose duty it is to instruct a young and inexperienced employee as to the dangers attending his employment fails so to do, such negligence is that of the company, as it relates to a duty personal to the master. As to such duties he cannot be regarded as a fellow-servant.⁴

2460. Where defendant's building superintendent or foreman caused an excessive weight of snow and debris to be thrown and left upon the roof of a shed, in consequence of which it fell upon and injured an employee, it was held he was as to such act a representative of the master, and not a fellow-servant of such workman.⁵

2461. It was held that the superintendent of a mill, who had charge of the slab-burner, which collapsed by reason of being overheated, through the direction of such superintend-

¹ Pool v. C., M. & St. P. R. Co., 53 Wis. 657, 56 Wis. 237.

² Mulcairns, Adm'x, v. City of Janesville, 67 Wis. 24.

³ Hulehan v. G. B., W. & St. P. R. Co., 68 Wis. 520.

⁴ Nadau v. White River Lumber Co., 76 Wis. 120; Klochinski v. Shores Lumber Co. (Wis.), 67 N. W. 934.

⁵ Johnson v. First Nat. Bank of Ashland, 79 Wis. 414.

ent, whereby a carpenter in the employ of the defendant, while passing along by and near the burner in the line of his duty, was injured, was a vice-principal and not a fellow-servant of the workman injured.¹

2462. An employee was injured while working for the defendant as a riveter on a "whaleback" vessel by reason of the improper and dangerous manner in which a scaffold had been suspended and adjusted for him to work upon. It was the custom and understanding that all scaffolds should be supplied by the defendant for the riveters, and placed in position and adjusted by men employed by the defendant for that special purpose, and doing the work under its supervision, and that the riveters should give them no assistance or directions except to indicate where the scaffold should be placed. It was held that the scaffold builders were not fellow-servants with plaintiff, but were charged with the duty which defendant owed him of providing a safe place to work, and hence their negligence in that respect was the negligence of the defendant.²

2463. An employee, while working at night on the repair force in defendant's yard, was struck and injured by a rapidly-moving detached car which had been kicked by a switch-engine upon the main track without any person or light on its front end to give warning of its approach. The foreman had directed a brakeman to ride the car, but instead of mounting the forward end he took his position upon the rear of the car. It was said: Evidently the riding of cars in the night-time, by a brakeman or employee on the front end with a lantern, may serve to signal the approach of the car or cars, and regulate or stay their course by means of the brake, and operates as a precaution calculated to prevent accident and injury to the workmen in the yard. It may be properly considered as a reasonable precaution and measure of safety which it was the duty of the company to take for that purpose, and in that view the servant of the company

¹ *Faerber v. Scott Lumber Co.*, 86 Wis. 226.

² *Cadden v. American Steel Barge Co.*, 88 Wis. 409.

riding the coach in the present case was charged by the company, through the foreman, with the duty the company owed the plaintiff and others of its employees at work in the yard. He was the agent of the company for the performance of that duty, and his failure to properly perform it is to be imputed to the company, and its liability for its non-performance would still remain.¹

2464. A general manager of a railroad company who prescribes rules, or a train-dispatcher who gives special orders, is not a fellow-servant with employees in charge of the train.²

2465. It is the duty of a railroad company to keep its track free from obstructions which render the moving of cars upon it dangerous to its employees, and the company is under obligations to see that this duty is performed by some one. This is a duty or implied contract which the master must perform himself or by some other, and until it is performed his duty from the implied contract is not kept or fulfilled.³

3. Fellow-servants.

2466. Where an express messenger in the employ of the defendant company was injured through the alleged negligence of an engineer upon the same train, it was held that, if such was the cause of the injury, he could not maintain an action against the common employer, on the ground that they were fellow-servants and his negligence was a risk assumed.⁴

¹ *Promer v. Mil., Lake Shore & W. R. Co.*, 90 Wis. 215. *Contra*, *Potter v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 77; *Central R. Co. of N. J. v. Keegan*, 160 U. S. 259.

This is hardly consistent with *Luebke v. Railway Co.*, 63 Wis. 91, where a person provided to guard a car-repairer while at work was held to be a fellow-servant, and is directly contrary to *Potter v. Rail-*

way Co., 136 N. Y. 77, where it was held that the failure of a brakeman to be at his post on the top of cars being shunted was the negligence of a co-servant.

² *Phillips, Adm'x, v. C., M. & St. P. R. Co.*, 64 Wis. 475.

³ *McClarney v. C., M. & St. P. R. Co.*, 80 Wis. 278.

⁴ *Chamberlain v. Mil. & Mis. R. Co.*, 7 Wis. 367.

2467. Upon a second appeal in this case the doctrine first announced was denied and overruled, and it was held that an employee may recover for an injury occasioned by the negligence of another employee engaged in the same business, upon the general rule that every person is responsible for injuries occurring to others by the negligence of his servants while in the execution of his employment.¹

2468. A baggageman, acting as brakeman, was injured by the rails being removed in making repairs. It was held that the injury was occasioned by the act of co-employees, and he could not recover. The court say they dissent from the opinion rendered in *Chamberlain v. Railway Co.*, 11 Wis. 248, in respect to the unbroken current of judicial opinion elsewhere.²

2469. Where an employee was injured by the want of repair of a car which was being transported to the shops for inspection and repair, which he attempted to mount at the direction of the foreman of the gang, of which such injured employee was a member, it was held that the plaintiff assumed the risk of such condition as incident to his employment, but failed to decide whether such foreman was or was not a fellow-servant, if he had actually known of such defect and, notwithstanding, had directed the servant to mount the car.³

2470. Where an employee was injured by the overturning of an engine, which was being used to break out the road, in an attempt by the conductor to remove a snow-bank by the momentum of the engine, he being one of the crew engaged for that purpose, it was held that such conductor and employees were fellow-servants.⁴

2471. An employee working in a lumber-yard under the direction of a foreman, injured by the negligent act of such foreman in directing a car to be moved, cannot recover from

¹ *Chamberlain v. Mil. & Mis. R. Co.*, 11 Wis. 248.

² *Moseley v. Chamberlain*, 18 Wis. 700.

³ *Flannagan v. C. & N. W. R. Co.*, 50 Wis. 462.

⁴ *Howland v. Mil., L. S. & W. R. Co.*, 54 Wis. 226.

the master. Such foreman and employee are fellow-servants.¹

2472. The conductor of a gravel train and member of the crew are fellow-servants, where one of the latter is injured by the negligent order or direction of the conductor.²

2473. Those in charge of and operating a road-engine, for the time being used for switching purposes in a railroad yard, are the fellow-servants of a switchman injured by the negligent manner in which such engine is operated.³

2474. A conductor and a brakeman upon the same train are fellow-servants, where the latter is injured by the former's negligence in starting the train while the latter is under the platform of a car attempting to uncouple cars.⁴

2475. The master and mate of a vessel are fellow-servants. The case of *Thompson v. Hermann*, 47 Wis. 602, distinguished. It is said that the relations existing between a master and mate and master and seaman are not the same.⁵

2476. The plaintiff, a mason employed with other masons, carpenters and section-men in the erection of a water-tank and wind-mill, was injured by the falling of a portion of the framework, which he was assisting to raise. The apparatus for raising such framework consisted of a windlass crab, tackle-blocks, ropes and the water-tank itself, and an anchor-post set in the ground, all of which had been placed in position and adjusted under the direction of the foreman. The fall of the framework was caused by the giving way of the anchor-post, which had not been set in the ground a sufficient depth. It was held that the whole apparatus for hoisting could not be considered a single machine, which the defendant was bound to furnish adjusted and in position to do the work, but the placing and adjustment of the detached appliances were a part of the work to be done. The injury

¹ *Hoth v. Peters*, 55 Wis. 405.

⁴ *Pease, Adm'x, v. C. & N. W. R.*

² *Heine v. C. & N. W. R. Co.*, 58 Wis. 525.

⁵ *Mathews v. Case et al.*, 61 Wis.

³ *Fowler v. C. & N. W. R. Co.*, 61 Wis. 491.

Wis. 159.

was caused, therefore, not by any failure of the defendant to furnish proper and safe machinery or appliances, but by the negligence of the foreman in the management of such appliances; that such foreman was a fellow-servant with the other employees.¹

2477. Where a railroad company provides a watchman to guard an employee from danger while at work under a car, his neglect of duty in this respect is the neglect of fellow-servants.²

2478. One whose duty it is to inspect foreign cars is a fellow-servant while engaged in such service with the operatives of trains.³

2479. Coal-heavers or firemen who load coal upon tenders are fellow-servants of a track-walker, and for injury to the latter caused by their negligence in the performance of such work the company is not liable.⁴

2480. Though by the rules of a railroad company its station agent is held responsible for the safety of switches, and is expressly required to see that the main track is kept clear and unobstructed for the passage of trains, yet such an agent is a fellow-servant of a brakeman on a train of the company passing his station. This result was reached upon the ground that the duties of each pertain to the operation of the road.⁵

2481. An employee while going to and from his work, either upon the trains of the company or using a path across the premises of his employer by permission, is at such time considered in the actual employ of the master, to the extent that if injured by the negligence of other servants of the same master he cannot recover for such injury from the master. He and the servants causing the injury in such case, and under such circumstances, are fellow-servants.⁶

¹ *Peschel v. C., M. & St. P. R. Co.*,
62 Wis. 338.

² *Luebke v. C., M. & St. P. R. Co.*,
63 Wis. 91.

³ *Kelley, Adm'x, v. Abbott*, 63
Wis. 307.

⁴ *Schultz v. C. & N. W. R. Co.*, 67
Wis. 616.

⁵ *Toner v. C., M. & St. P. R. Co.*,
69 Wis. 188.

⁶ *Ewald v. C. & N. W. R. Co.*, 70
Wis. 420.

2482. An employee of another was requested by the defendant's foreman to assist in raising a section of water pipe in a trench, and in so doing was injured by the pipe slipping from the blocks. It was held that the plaintiff could not recover, for the reason that such foreman was his fellow-servant.¹

2483. An agent or employee, who may be a vice-principal as to the transaction of the general business of the defendant at a given point, is still but a fellow-servant of other employees when he is engaged in performing such duties as pertain to a servant. Thus, where an agent of an express company at a city, while driving the company's wagon in taking freight from the company's office to the trains, caused injury to another employee, as was alleged, by careless driving, it was held that as to such acts he was but a mere servant.²

2484. Where it is a part of the duties of employees to select materials furnished by the master, some for use of other servants, and injury is caused by the selection of such as are unfit, there being sufficient that are fit and suitable to select from, such servants so selecting the materials are performing the duties of servants and are fellow-servants of the employees who are to use them, though not at work at that time. So held where servants selected a plank to be used as a bridge to carry charcoal from a car to a shed, which, owing to some defect, broke.³

2485. Where defendant's coal-dock, not in use, was undergoing repairs, and a carpenter at work on one of the chutes was injured by the negligence of an engineer in allowing the slack of a cable to drop into the chute unnoticed by such carpenter, and without warning started the machinery, thereby raising the cable in such a way as to injure such carpenter, it was held that the engineer was his fellow-servant.⁴

¹ Johnson v. Ashland Water Co., 77 Wis. 51.

² Dwyer v. American Express Co., 82 Wis. 307.

³ Van den Heuvel v. Nat. Fur. Co., 84 Wis. 636.

⁴ Porter v. Silver Creek & Morris Coal Co., 84 Wis. 418.

2486. A foreman, while engaged with another workman in adjusting pipes on a scaffold, was held a mere fellow-servant of another, and their employer was not liable for an injury to the latter, caused by negligence or an improper direction of the foreman, where such direction was one appropriate for one fellow-servant to give another.¹

2487. Where a superintendent goes outside his duties, and as a volunteer assists an employee to do certain work, he is as to such work a fellow-servant of the employee.²

2487a. A superintendent of a mill, in directing an employee to work in a dangerous place with him without giving needed instructions as to the danger, is a vice-principal; where, however, such superintendent voluntarily takes part in the work, which is not a part of his duties as such, then a negligent direction to such employee while they are thus working together is not to be considered as the act of the master, but of a fellow-servant.³

2488. A car-repairer and a switchman are fellow-servants.⁴

2489. Brick masons and their attendants in the employ of the same person, and engaged in the same work upon the same scaffold, are co-employees, and the employer is not liable for injury to one caused by the negligence of another.⁵

4. Statute.

2490. "Every railroad corporation shall be liable for all damages sustained by an agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state, or when such agent or servant is a resident of and his contract of employment was made in this state. No contract, rule or regulation between any such corporation and any agent or servant shall impair or diminish such liability."

¹ *Stutz v. Armour et al.*, 84 Wis. 623. See, also, *Kliegel v. Weisel & Vilter Mfg. Co.*, 84 Wis. 148.

² *Hartford v. Northern Pacific R. Co.*, 91 Wis. 374, 64 N. W. 1033.

³ *Klochinski v. Shores Lumber Co.* (Wis.), 67 N. W. 934.

⁴ *Smith v. C., M. & St. P. R. Co.*, 91 Wis. 503, 65 N. W. 188.

⁵ *Blazinski v. Perkins*, 77 Wis. 9.

This statute was repealed by chapter 232, Laws of 1880, the common-law rule being in force until 1889, when the following act was passed: "Every railroad corporation doing business in this state shall be liable for damages sustained by an employee thereof within this state, without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yard-master, conductor or engineer, or of any other employee who has charge or control of any stationary signal-target, point, block or switch."

This act was repealed in 1893, and the following law enacted: "Every railroad or railway company operating any railroad or railway, the line of which shall be, in whole or in part, within this state, shall be liable for all damages sustained within this state by an employee of such company without contributory negligence on his part: First. When such injury is caused by any defect in any locomotive, engine, car, rail, track, machinery or appliance required by said company to be used by its employees in and about the business of such employment, when such defect could have been discovered by such company by reasonable and proper care, tests or inspections; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company. Second. Or while such employee is so engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of, or for failure to discharge, his duties as such. No contract, receipt, rule or regulation between any employee and a railroad company shall exempt such corporation from the full liability imposed by this act."

2491. In an action brought under the latter statute the only cause of action alleged was for the negligence of an engineer, and at the trial the evidence was directed to

an attempt to show that the person was yard-master and that the injury was caused by his negligent and improper conduct. It was said: "The rules of pleading require that the allegations of a complaint, under this statute, shall show clearly the relations between the negligent party and the company which are relied upon, and the proofs must be confined to the allegations made."¹

2492. This statute does not change the rule as to the burden of proving contributory negligence.²

2493. Under the statute of 1889 declaring a railroad company liable for damages to an employee caused by the negligence of a train-dispatcher, telegraph operator, superintendent, yard-master, conductor or engineer, or of any other employee who has charge or control of any stationary signal, target, point, block or switch, the word "superintendent" applies only to one having to do with the movement of trains and cars, and does not include the foreman of a repair shop.³

II. RULE IN THE UNITED STATES.

United States Supreme Court.

1. Duties Personal to the Master — Vice-principals.

2494. To the general rule as stated there are well-defined exceptions, one of which arises from the obligation of the master not to expose his servants, when conducting his business, to perils or hazards against which they may be guarded with proper diligence upon his part; therefore it has no application to the character and condition of the appliances which are furnished for the use of employees. Such duty is personal to the master, and those who are performing it are charged with the master's duty. They are employed in a distinct and independent department of the service.⁴

¹ *Albrecht v. Milwaukee & Superior R. Co.*, 87 Wis. 105.

² *Dugan v. C., St. P., M. & O. R. Co.*, 85 Wis. 609.

³ *Hartford v. Northern Pacific R. Co.*, 91 Wis. 374, 64 N. W. 1033.

⁴ *Hough v. Railway Co.*, 100 U. S. 213; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642.

2495. It was held that a railroad company was responsible to its train servants and its employees for injuries received by them in consequence of neglect of duty by a train conductor in charge of a train, with a right to command its movements and control the persons employed upon it, and that such conductor was not a fellow-servant of such employees, but rather a vice-principal. This ruling was founded upon the assumption that a railroad train was a separate department of the company's business, and that the conductor was in charge thereof.¹

2496. Inspectors of appliances of railroad companies in the performance of their duties directly represent the company. Such duties cannot be delegated so as to relieve the company from responsibility for an omission to perform the same or for an improper performance thereof.²

2496a. The previous cases in this court reviewed and the conclusion reached that the following points were determined:

1. That among the personal duties of the master is the furnishing of a reasonably safe place for doing the work, reasonably safe tools and appliances for the accomplishment of the work, the exercise of proper diligence in the employment of reasonably safe and competent men, and the adoption and promulgation of safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. Those servants whom he selects to perform these duties for him are not fellow-servants of other employees, but represent the master, who is responsible for the manner in which they are performed.

2. That the fact that one servant is superior in authority to another does not have the effect to change his relation of being a fellow-servant.

3. The mere fact that the function of one is to exercise supervision and control over some work undertaken by the

¹C., M. & St. P. R. Co. v. Ross, 112 U. S. 377. See, however, Balt. & Ohio R. Co. v. Baugh, 149 U. S. 368.
²Union Pacific R. Co. v. Daniels, 152 U. S. 684; Balt. & Potomac R. Co. v. Mackey, 157 U. S. 72.

master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management, does not constitute such supervising servant a vice-principal; reviewing the decisions of the circuit court of appeals upon this point.

4. That in order to constitute a superior servant a vice-principal, he must be one who is clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.

5. That when the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employees under them, vice-principals and representatives of the master as fully and completely as if the entire business of the master were placed by him under one superintendent.

Hence, it was held that a foreman who had charge of a gang of men in putting in ties and assisting in keeping in repair three sections of road, with power to hire and discharge, and who had exclusive charge of their direction and management in all matters connected with their employment, was a fellow-servant of such employees.¹

2496b. The general principles of the law as set forth in the opinion in the preceding case were held to be applicable to the facts in this case and to govern it. Hence, it was held that a section-man who was injured by the alleged negligence of the section-foreman in running a hand-car, and of the engineer upon a freight train in not giving warning by signal of the approach of the train, could not recover; that they were his fellow-servants.²

¹ *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346. less, 163 U. S. 350. (51 Fed. 562, reversed.)

² *Northern Pacific R. Co. v. Char-*

2. Fellow-servants.

2497. It was said the doctrine of fellow-servants proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be encountered the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule; but this presumption cannot arise where the risk is not in the contract of the servant and the servant had no reason to believe he would have to encounter it. It was accordingly held, where a boy of tender years was ordered to adjust a belt by his superior upon a rapidly-revolving gearing, which was a work outside of his employment and extremely dangerous, and while doing so was injured, that the rule had no application.¹

2498. A brakeman working a switch for his train on one track in a railroad company's yard is a fellow-servant of an engineer of another train of the same corporation upon an adjacent track, and cannot maintain an action against the corporation for injury caused by the negligence of the engineer in driving his engine too fast and not giving due notice of its approach.²

2499. Carpenters under charge of a foreman, and bricklayers, all employed by the owner, through his superintendent, engaged in the erection of a building, are fellow-servants, and one of such carpenters, injured by reason of the manner in which the foreman directs the work to be done, has no right of action against the common employer.³

2500. The stewardess of a vessel and the porter and carpenter on the same were held to be fellow-servants where the former was injured by reason of the negligence of the others in not properly replacing the guards which protected the gangway, whereby the stewardess, in leaning against

¹ *Railroad Co. v. Fort*, 17 Wall. 553.

² *Randall v. Baltimore & O. R. Co.*, 109 U. S. 479.

³ *Armour v. Hahn*, 111 U. S. 313.

such railing or guard, was, by its giving way, thrown into the water.¹

2501. An engineer and fireman were held to be fellow-servants, where the fact was that the engine was running alone without any train attached to it, though by the rules of the company the engineer in such case was made or called a conductor, and had full charge of such engine, where the fireman was injured by the negligence of such engineer. The decision in the *Ross Case*, 112 U. S. 377, was explained and distinguished. The court disavowed any intent to hold in the latter case that the mere fact that the conductor was the superior of the injured employee was sufficient to change their relation as fellow-servants, but affirmed that such decision was placed upon the ground that the conductor was in charge of a separate department of service, and hence was a vice-principal; and declared in the case under consideration that an engine in control of the engineer is not a distinct branch of the service, and therefore all employed in operating the same are fellow-servants.²

2501a. A force of men was engaged in placing selected cars on boats or floats, comprising a crew for that purpose, who were subject to the orders and directions of one of their number, called a foreman or conductor. In the movement of cars one of such employees, while proceeding to couple a car to the train, caught his foot in a switch and fell across the track. The rear car, which had been uncoupled, moved upon him. It was alleged that such foreman was negligent in not placing himself at the brake of the uncoupled car. It was held that such foreman and the plaintiff were fellow-servants, and the plaintiff could not recover. The rule applied in *Potter v. Railway Co.*, 136 N. Y. 77, was approved. It was there stated: "It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are intrusted with the management of the

¹ *Quebec Steamship Co. v. Merchant*, 133 U. S. 375.

² *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368.

yard. The details must be left to them, and all that the company can do for the protection of its employees is to provide competent co-servants and prescribe such regulations as experience shows may be best calculated to secure their safety."¹

2502. It was held that a common day-laborer in the employ of a railroad company, under the order and direction of a section-boss or foreman, on a culvert, who received an injury by and through the negligence of the conductor and of the engineer in operating a train, was a fellow-servant with such engineer and such conductor.²

2502a. An employee selected by a car-repairer to give him warning of the approach of cars is his fellow-servant, for whose neglect to give proper warning the company is not liable.³

Federal Courts Other than Supreme.

1. Rule in Respect to Following State Decisions and Laws.

2503. The state having power to determine the liability of an employer to an employee for injury sustained in his service, the construction put on its statute on the subject by its courts of last resort will be followed by the federal courts.⁴

2504. In the absence of legislative enactment the liability of the master to one of his employees for the negligence of another is determinable by general laws, and not by local laws, and the decisions of the state in which the injury is inflicted are not controlling in the national courts. But whenever the subject is regulated by the statutes of the state in which the injury is inflicted, these become the rules of decision at common law in the national courts under sec-

¹ Central R. Co. of New York v. Keegan, 160 U. S. 259.

⁴ Northern Pac. R. Co. v. Hogan (N. Dak.), 63 Fed. 102; Baltimore &

² Northern Pacific R. Co. v. Hambly, 154 U. S. 349.

O. R. Co. v. Camp (Ohio), 65 Fed. 952.

³ Southern Pacific R. Co. v. Pool, 160 U. S. 438.

tion 721 of the Revised Statutes, and measure the duties and liabilities of litigants.¹

2505. Under the general law as applied by the federal courts, a railroad company was said to be not liable for the injury of an employee on one train caused by the negligence of the conductor on another train in leaving a switch open; yet under the Montana statute, chapter 25, section 697, it was held the company was liable.²

2506. Where an action was brought in the state court by an employee, and the trial court dismissed his action on the ground that it appeared that the negligent foreman was his fellow-servant, which decision was affirmed by the supreme court of the state, and subsequently the same plaintiff brought an action in the federal court, it was held that the foreman was a vice-principal; that the judgment of the supreme court of the state was that of dismissal and did not go to the merits.³

2506a. It was said, where it was urged that the supreme court of Texas had by its decisions sustained the contention of counsel, "the questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."⁴

2506b. Where the roof of a mine was improperly timbered at the time an employee was hired and placed at work, and the defects were such as could be discovered by proper inspection, and where such employee was injured by reason of defects in the roof, it was held the doctrine of fellow-servants had no application.⁵

¹ Northern Pac. R. Co. v. Mase, 63 Fed. 114 (C. C. A.), citing Railroad Co. v. Hogan, 63 Fed. 102; Railroad Co. v. Ross, 112 U. S. 377; Railway Co. v. Baugh, 149 U. S. 368; Hough v. Railway Co., 100 U. S. 213; Railway Co. v. Prentice, 147 U. S. 101. See, also, Newport News & M. R. Co. v. Howe, 52 Fed. 362 (C. C. A.).

² Northern Pacific R. Co. v. Mase, 63 Fed. 114.

³ Woods v. Lindvall, 48 Fed. 62.

⁴ Hough v. Railway Co., 100 U. S. 213.

⁵ Western Coal & Mining Co. v. Ingraham, 70 Fed. 219.

Recent decisions of the United States supreme court have so affected the rule supposed to have

2. Duties Personal to the Master — Vice-principals.

2507. A car-inspector is not the fellow-servant of operatives on a railroad train, even when inspecting foreign cars.¹

2508. A conductor of a train was held to be a vice-principal where a brakeman was injured, caused by the negligence of the conductor in unexpectedly starting the train.²

2508a. A telegraph operator is not the fellow-servant of an engineer where the former neglects to transmit an order of the train-dispatcher relating to a change of schedule in operating trains.³

2509. The master of a steamboat, while in command and directing her movements, is a vice-principal of the owner and not a fellow-servant of the engineer, so as to prevent the recovery of damages from the owner for the death of the engineer, due in part to the master's negligence.⁴

2510. Although a switchman and track-repairers work in the same yard, and for the same general purpose of maintaining and operating a railroad of their common employer, yet if an injury to the switchman is caused by a trackman leaving a dangerous hole in the track, his negligence is attributable to the employer, in view of his positive duty to provide a reasonably safe place for the switchman to work, the measure of which duty is not changed by having it attended to by others.⁵

2510a. An inspector of locomotive boilers is not a fellow-servant of employees in a railroad yard.⁶

2511. The foreman of a gang of twenty laborers, who hired and discharged the men under him, kept their time

been established by the Ross Case that many cases here given are of doubtful authority.

¹ *Terre Haute & L. R. Co. v. Mansberger*, 65 Fed. 196 (C. C. A.); *Atchison, T. & S. F. R. Co. v. Myers*, 63 Fed. 793.

² *Canadian Pac. R. Co. v. Johnston*, 61 Fed. 738 (C. C. A.). *Railway Co. v. Ross*, 112 U. S. 377, followed.

³ *Frost v. Oregon Short Line & U. N. R. Co.*, 69 Fed. 936.

⁴ *McCullough v. New York, N. H. & H. R. Co. et al.*, 61 Fed. 364 (C. C. A.).

⁵ *Louisville & N. R. Co. v. Ward*, 61 Fed. 927 (C. C. A.).

⁶ *Texas & Pacific R. Co. v. Thompson*, 70 Fed. 944, 71 Fed. 531.

and directed and controlled their movements, was held not to be their fellow-servant. There were peculiar circumstances involved which may have influenced this decision.¹

2512. The foreman of an extra gang of track-repairers, whose sole duty was to supervise the work of track repairing upon some eighteen or twenty miles of the road-bed of the railroad company, and who had authority to hire and discharge the men necessary to do that work and to direct the operation of the force so employed, was held to be a vice-principal, for whose negligence the railroad company was liable, where one of the workmen of said gang was injured while acting under his orders.²

2513. It was held that a foreman who was in charge of a gang of workmen in construction work on a railroad, with full power to hire and discharge men, and direct them when and where and how to work, was a vice-principal, notwithstanding that he occasionally lent a hand in the actual manual labor.³

2514. Where the mate of a vessel in the absence of the captain continued to unload the cargo in a dangerous manner after his attention had been called to the danger and complaints had been made, and some of the cargo subsequently fell and injured a sailor, it was held that the rule of fellow-servants would not be applied. The decision was placed upon the ground, however, that knowledge of such danger on the part of the mate was knowledge of the owner, whose duty it was, when dangers are known, to provide seamen with reasonable security against them, by the usual means.⁴

2515. Track-men are not fellow-servants of those in charge of a train, where a track-man is injured by the negligence of the latter in failing to keep a lookout.

This decision seems to be based on what was held in *Davis*

¹ Cleveland, C., C. & St. L. R. Co. v. Brown, 56 Fed. 804 (C. C. A.).

³ Woods et al. v. Lindvall, 48 Fed. 62 (C. C. A.).

² Northern Pac. R. Co. v. Peterson, 51 Fed. 182 (C. C. A.); reversed, 162 U. S. 346.

⁴ The Frank & Willie, 45 Fed. 494 (D. C.).

v. Railway Co., 55 Vt. 84, but a moment's inspection of that case will convince the mind that it does not hold that view, but rather the general rule upon the subject, that, where a train-man is injured by reason of the neglect of a track-man to keep the track in repair, they are not fellow-servants, on the ground that the track-man is performing duties personal to the master; but where the track-man is injured by reason of the negligence of the train-men, they are fellow-servants, as the negligent party is not in the performance of personal duties.¹

2516. A locomotive engineer, charged with the duty of inspecting his engine, is not, in respect to the duty of such inspection, a fellow-servant of a hostler's helper, engaged in shifting engines in the railroad yard.²

2517. A railway company cannot delegate the duty of notifying those in charge of its trains of a change in running trains, and where an engineer has been killed in an accident caused by the negligence of a telegraph operator in transmitting orders, the railway company cannot escape liability on the ground that they were fellow-servants.³

2518. Where a miner was injured by the fall of the roof of that part of the mine where he was working, in consequence of the negligent manner in which the timbering had been done by other employees of the mine-owner before such miner was hired, the defects being such as could be discovered by proper inspection, it was held that the doctrine of fellow-servants had no application.⁴

3. Fellow-servants.

2519. A conductor upon one train is a fellow-servant of the operatives of another train. It was also held that those who engaged in operating switches, whether conductors or employees specially engaged for such service, are perform-

¹ Howard v. Delaware & H. Canal Co., 40 Fed. 195.

² Atchison, T. & S. F. R. Co. v. Mulligan, 67 Fed. 569.

³ Frost v. Oregon S. L. & U. N. R. Co., 69 Fed. 936.

⁴ Western Coal & Mining Co. v. Ingraham, 70 Fed. 219 (C. C. A.).

ing duties which pertain to the operation and use of appliances, which are distinct from duties which relate to the furnishing of appliances. It was said the decision in the *Ross Case* has been so limited and restricted by subsequent decisions of the supreme court that it cannot now be treated as authority in any case which does not present substantially the same state of facts.¹

2520. Where an injury was caused to a brakeman, while coupling, by the backing without warning of a yard engine, in execution of orders given by the train-master through the conductor, it was held that his injury was caused by the negligence of his fellow-servants in the execution of a proper order.²

2521. A foreman of a railroad company's bridge, while being transported to a place of work on the company's train, was held not a fellow-servant of the conductor of such train. Though still a servant, the court applied to him the doctrine of the *Ross Case*, that the conductor was in charge of a separate department of the company's business while operating the train, and was therefore a vice-principal as to all other employees on the train.³

2521a. Where a contractor in doing the work of grading a street had two gangs of laborers, each under a separate foreman, the latter having authority to hire and discharge his own men and direct their work, it was held that such foreman was a fellow-servant with employees under his charge.⁴

2522. Railroad section-men and laborers on repair trains, employed by the same master for the same general purpose of keeping the road-bed and track in order, and working for the same general result, are fellow-servants, and the employer is not liable for injuries to one caused by the neg-

¹ *St. Louis, I. M. & S. R. Co. v. Needham et al.*, 63 Fed. 107 (C. C. A.); *Northern Pac. R. Co. v. Mase*, 63 Fed. 114. See, also, *Balt. & O. R. Co. v. Andrews*, 50 Fed. 728.

² *Martin v. C. & A. R. Co.*, 65 Fed. 384 (C. C. A.).

³ *Northern Pac. R. Co. v. Beaton*, 64 Fed. 563 (C. C. A.).

⁴ *Balch v. Haas*, 73 Fed. 974.

ligence of another, even though such other has control over either gang of men.¹

2522a. A railroad employee who is one of a gang of men employed to move a wreck cannot recover from the company for injuries caused by the negligence of the wreckmaster who has charge of the wrecking-car. They are fellow-servants.²

2523. A laborer on a work train is a fellow-servant with the conductor and engineer of a freight train of the same company. The engineer and conductor of a work train are fellow-servants with the laborers thereof, where it is in charge of the road-master, who directs its movements and has control of all persons employed upon it.³

2524. Where a city engineer, declared by the charter of the city to be the general superintendent of all work done by the city upon the streets, appoints a superintendent of sewer construction to have charge of that department of work, and the latter employs a foreman who controls a gang of men, with power to hire, discharge and direct when and where and how to work, such foreman is not a general vice-principal for the city in relation to workmen under him injured by his negligent act.⁴

2525. A laborer acting as a temporary foreman of a bridge gang, but at the same time actually assisting in the labor, is a fellow-servant of the members of the gang.⁵

2526. A telegraph operator at a way station, whose duty it is under the general rules of the railroad company to display signals to prevent one train following another on the same track too closely, is the fellow-servant of a locomotive fireman injured in a collision caused by the operator's neglect of such duty.⁶

¹ *Thom v. Pittard*, 62 Fed. 232 (C. C. A.).

² *McGrath v. Tex. & P. R. Co.*, 60 Fed. 555 (C. C. A.).

³ *Northern Pacific R. R. Co. v. Smith*, 59 Fed. 993 (C. C. A.).

⁴ *City of Minneapolis v. Lundin*, 58 Fed. 525 (C. C. A.).

⁵ *Texas & P. R. Co. v. Rogers*, 57 Fed. 378 (C. C. A.).

⁶ *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. 125 (C. C. A.); *McKaig v. Railway Co.*, 42 Fed. 288.

2527. The foreman in a coal mine whose duty it is to direct ten or twelve men what to do, and to prop the roof of rooms with timber, to inspect them and see if they are safe, and to drill holes in the face of the rooms, charge them with powder and then fire them, but who is subject to the order of the pit boss and superintendent, is a fellow-servant of an employee engaged under his direction who is injured while in the performance of his duty of shoveling and removing coal and dirt and assisting the foreman in his work.¹

2527a. The foreman of a railroad bridge gang having authority to hire and discharge men under him, and sole power to direct and control them in their work, but who himself is subordinate to a superintendent of bridges, is a fellow-servant of the men under his control, even as to the adoption of a dangerous method of doing a piece of work.²

2528. A yard clerk or a car clerk in a railroad freight station, whose duty required him to go into the yard for the purpose of getting a record of the seals of the cars which each train left or was to take away, was held to be a fellow-servant of the engineer and train hands of a freight train.³

2529. A brakeman sent by the conductor from the rear portion of a parted train to signal the forward portion, of which the engineer is by rules of the company the conductor, was held to be a fellow-servant of the engineer.⁴

2530. The cook and engineer on a river steamboat, exercising no authority the one over the other, and both subject to the master, are fellow-servants, and the cook cannot recover for damages caused by the engineer's negligence.⁵

2531. The second mate of a vessel and a longshoreman engaged in loading a vessel are fellow-servants.⁶

¹ *What Cheer Coal Co. v. Johnson*, 56 Fed. 810 (C. C. A.).

² *Cleveland, C., C. & St. L. R. Co. v. Brown*, 73 Fed. 970.

³ *New York & N. E. R. Co. v. Hyde*, 56 Fed. 188 (C. C. A.).

⁴ *Newport News & M. V. Co. v. Howe*, 52 Fed. 362 (C. C. A.).

⁵ *Grimsley v. Hankins*, 46 Fed. 400 (D. C.).

⁶ *Hamilton v. The Walla Walla*, 46 Fed. 198.

2532. A foreman of a railroad repair shop, to whom is intrusted the task of restoring a wrecked train, with the assistance of a crew of men selected from the workmen in the shop and the section-hands, and who has charge of all the men engaged in restoring the train, is, when in charge of such wreck, a vice-principal, for whose negligence the company is liable to workmen injured while under his orders.¹

2533. Locomotive engineers are fellow-servants, and the company employing them is not liable for injuries resulting to one from the negligence of another in a collision.²

2534. The conductors of electric railway cars on the same road are fellow-servants, and the common employer is not liable for an injury to one of them resulting from a collision caused by the negligence of another.³

2535. A track foreman in the employ of a railroad company, who is required to report to the superior and receive instructions as to all his work; who can only suspend or discharge the men in his gang temporarily, and subject to the approval of the superior; who follows minute directions as to the use of the track in his work, and who works with the men forming the gang under his charge, is a fellow-servant of the members of such gang, who assume the risk of injury by his negligence.⁴

2535a. The negligent act of a foreman in charge of a quarry, in the method of splitting stone with the use of wedges, was held to be the act of a fellow-servant where an employee under him was injured as a result.⁵

2535b. A section foreman is a fellow-servant with members of his crew.⁶

¹ Borgman v. Omaha & St. Louis R. Co., 41 Fed. 667. See, however, Co. v. Atlanta Traction Co., 69 Fed. 358.
² Railroad Co. v. Baugh, 149 U. S. 369.
³ Deavers v. Spencer, 70 Fed. 480 (C. C. A.).

⁴ Van Avery v. Union Pac. R. Co., 35 Fed. 40.
⁵ Reed v. Stockmeyer, 74 Fed. 186.
⁶ Kansas & A. V. R. Co. v. Waters, 70 Fed. 28.

³ Baltimore Trust & Guaranty

CHAPTER XI.

FOREIGN CARS.

A. *The Master's Duty that of Inspection*, 2536 et seq.

B. *Cars Different in Style of Construction from its Own*, 2554 et seq.

A. *The Master's Duty that of Inspection.*

2536. The duty of a railroad company in respect to foreign cars is not that of furnishing proper machinery for service, and seeing that the same is kept in repair, but this duty is one of inspection, and is performed by the employment of sufficient competent inspectors, who are to act under proper instructions, rules and superintendence. The failure to make such inspection, or neglect to make it with reasonable care, is the negligence of the company. If the car come to it with defects visible or discoverable by ordinary inspection, its duty is either to return the car to the company from which it came or to repair it sufficiently to make it reasonably safe. The inspection which the company is required to make of a foreign car tendered to it by another for transportation over its lines is not merely a formal one, but should be made with reasonable diligence so that its employees will not be exposed to perils which reasonable care would have guarded against. It is not, however, to be held responsible for hidden defects which could not have been discovered by such an inspection as the exigencies of traffic will permit.¹

2537. The obligation on the part of the master in respect to foreign cars is to provide, at the point where such cars are received, competent and suitable inspectors, acting under proper instructions and superintendence, to examine such

¹ Atchison, T. & S. F. R. Co. v. Haute & I. R. Co. v. Mansberger, Myers, 63 Fed. 793 (C. C. A.); Terre 65 Fed. 196 (C. C. A.).

cars and determine whether they are in condition to be received and handled with safety. The burden of proof is upon the plaintiff in such cases, and he must satisfy the jury, by a fair preponderance of evidence, either that there was not a competent inspector, or that there was an insufficient number of inspectors, or that the inspector was not acting under instructions, that he was not properly instructed what he should do, or that he was not properly superintended in the performance of his duty.¹

2538. The master's duty in respect to foreign cars is that of providing for their proper inspection. The manner of using such cars and its own may be left to competent servants; and where proper pins for coupling have been provided, the failure to use them properly, or to replace one too short with another, is the fault of such servants.²

2539. It was said: If a railroad corporation is bound to use reasonable care in furnishing its employees with suitable cars on which they are employed, this rule does not apply to cars received from another company while in transit to its place of destination, but the only duty it owes its employees in such a case is that of providing suitable and competent inspectors.³

2540. A railroad company receiving the cars of another company to be hauled in its trains is bound to inspect such cars before putting them in its trains, and is responsible to its employees for injuries inflicted upon them in consequence of defects in such cars which might have been discovered by reasonable inspection before admitting them into a train.⁴

2540a. Where foreign cars appear to be in an ordinarily safe and proper condition, railroad companies are obliged to transport them. Their duty in respect to such cars is that of inspection merely. It is not the exercise of reasonable

¹ Keith v. New Haven & N. R. Co., 140 Mass. 175.

² Mackin v. Boston & Albany R. Co., 135 Mass. 201.

³ Thyng v. Fitchburg R. Co., 156 Mass. 13. See, however, Goodrich v. Railway Co., 116 N. Y. 398.

⁴ Baltimore & Potomac R. Co. v. Mackey, 157 U. S. 72.

diligence to make such cars reasonably safe. It is their duty, however, before placing them in use, to make proper inspection to ascertain their condition.¹

2540b. It is the duty of railroad companies to inspect such cars before putting them in use where there is time and opportunity to do so. They will be chargeable with the consequences of such defects as an ordinary inspection would have discovered. They will not be excused for a failure to perform that duty because such cars are only used for a brief time or carried a short distance. The fact that the company is not required to repair defects does not relieve it from its duty of inspection.²

2541. Where the ladder on a foreign car was insufficiently fastened, and thereby injury was caused to an employee, the defect being latent, it was held that, in the absence of proof of knowledge of such defect on the part of the company, no negligence was proved. The court seemed to take the position, which in a later case they assumed unhesitatingly, that the duty on the part of the carrier receiving loaded cars from another company is that merely of inspection, and that it may assume that all parts of such car which appear to be in good condition are so in fact.³

2542. The liability of the company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which the employees may work, but upon its knowledge, actual or presumed, of the actual condition of the appliance as to construction and defect. Its duty is one of inspection, and this duty is performed by the employment of sufficient competent inspectors acting under proper superintendence, rules and instructions.⁴

2543. While it is not the duty of a railroad company, at the time of receiving foreign cars for transportation, to

¹ Chicago & G. W. R. Co. v. Armstrong, 62 Ill. App. 228.

³ Ballou v. C. & N. W. R. Co., 54 Wis. 257.

² Atchison, T. & S. F. R. Co. v. Penfold (Kan.), 45 Pac. 574.

⁴ Kelley v. Abbot, 63 Wis. 310.

make tests to discover hidden defects in their construction, yet it is bound to inspect them, as it must its own after they have been in use. If such cars have obvious defects which render them unfit for use, they should not be received.¹

2544. It was held to be at least the duty of a railroad company to make a reasonable inspection of foreign cars being hauled over its road, and it will be held responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. This was held in reference to cars, where the alleged defect was in the manner of construction, where bumpers were not extended so as to admit of coupling with reasonable safety.²

2545. A railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars. It owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. Where cars come to it from another road which have defects visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains on its road or furnished to its employees for transportation.³

2546. The duty imposed upon a railway company to inspect cars received from other companies and to see that they are in good and safe condition for their employees to handle does not apply to persons or companies on whose sidings loaded cars are delivered for the purpose of permitting the owner of the siding to unload the freight, even though the sidings of such persons or company may be extensive and great in length.⁴

2546a. Where foreign cars have coupling appliances unlike those on the cars used by a company, and they are for such

¹ Guttridge v. Mo. Pac. R. Co., 94 Mo. 468.

³ Goodrich v. N. Y. C. & H. R. R. Co., 116 N. Y. 398.

² Gottlieb v. N. Y., L. E. & W. R. Co., 100 N. Y. 462.

⁴ McMullen v. Carnegie Bros. & Co., 158 Pa. St. 518.

reason more dangerous to couple and cannot be coupled in the same manner with safety, it is the duty of the company to instruct an inexperienced brakeman in its employ as to the proper method of coupling such cars.¹

2547. The duty on the part of railroad companies of inspection of foreign cars is the same as in respect to its own cars.²

2548. It was early held in Michigan that the duty of the employer in respect to foreign cars was the same as to its own, so far as using proper means to discover defects, and it was not negligence to take cars with double dead-woods; and also held that where competent inspectors were employed for that purpose the master had done his duty; that such inspectors were fellow-servants of operatives; that the use of such cars was incident to the service.³

2549. Yet it was said that, in order to keep machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections and examinations, and he cannot escape responsibility by delegating this duty to one who in other respects may be a fellow-servant of the person injured, by the failure to properly perform this duty.

The cases of *Smith v. Potter*, 46 Mich. 258, and *Hathaway v. Railway Co.*, 51 Mich. 253, in so far as they apply to inspectors of domestic cars, were practically overruled.⁴

2551. In a later case it was said that where a railroad company furnishes safe cars and a competent inspector, it is

¹ *Illinois Central R. Co. v. Price*, 72 Miss. 862, 18 So. 415.

² *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62; *Smith v. Potter*, 46 Mich. 258; *Hathaway v. Railway Co.*, 51 Mich. 253; *Jones v. Railway Co.*, 92 N. Y. 628; *Miller v. Railway Co.*, 99 N. Y. 657.

³ *Smith v. Potter*, Receiver, 46 Mich. 258; *Hathaway v. Mich. Cent. R. Co.*, 51 Mich. 253.

⁴ *Van Dusen v. Letellier*, 78 Mich. 492, citing *Swoboda v. Ward*, 40 Mich. 420; *Quincy Mining Co. v. Kitts*, 42 Mich. 39; *Parkhurst v. Johnson*, 50 Mich. 70; *Ryan v. Bagaley*, 50 Mich. 179; *Huizega v. Lumber Co.*, 51 Mich. 272; *Smith v. Car Works*, 60 Mich. 502; *Marshall v. Furniture Co.*, 67 Mich. 167.

not liable to a brakeman for injuries received while attempting to couple a properly constructed car, which has been accepted by the inspector from another company, on to another car, by reason of the projection over the end of the car so inspected of a portion of the lumber with which it is laden.¹

2551a. It was held that where a brakeman received an injury through a defect in the steps of a freight-car, which was a foreign car, he might recover from the defendant company. The defendant's duty was said to be that of inspection, and if it pass and haul cars faulty in construction or dangerously out of repair it is answerable to its own employees who are thereby injured. It was said that no sufficient reason appears for discriminating between the liability of a railroad company for injuries to its employees in handling upon its own line the cars of another corporation which are faulty in construction or dangerously out of repair, and its liability to them for injuries in handling such cars by its order elsewhere. It is not the ownership of the cars or of the line on which they are moved which imposes the liability upon the company, it is the handling and shifting of them by orders.²

2551b. It is the duty of a railroad company receiving foreign cars to be transferred over its line to see that they are reasonably safe for the use of its employees. It is under the same obligation with reference to an inspection as it is in respect to its own cars.³

2552. Where a railroad company has employed a competent inspector to inspect all cars received by it and see that they are properly loaded, it cannot be held liable to a brakeman who, in coupling one of such cars to another, is injured by reason of lumber being so loaded as to project over the end of the car.⁴

¹ *Dewey v. D., G. H. & M. R. Co.*, 97 Mich. 329.

² *Elkins v. Pennsylvania R. Co.*, 171 Pa. St. 121, 33 Atl. 74.

³ *Louisville & N. R. Co. v. Reagen* (Tenn.), 33 S. W. 1050.

⁴ *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329.

2553. The liability of the company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employees may work, but upon its knowledge, actual or presumed, of the actual condition of the appliance as to construction and defect. Its duty is one of inspection, and this duty is performed by the employment of sufficient and competent inspectors acting under proper superintendence, rules and instructions.¹

B. Cars Different in Style of Construction from Its Own.

See INSPECTION; FELLOW-SERVANTS, INSPECTORS.

2554. It does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads in general use which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which the employee assumes in undertaking the employment. He knows, or is bound to know, that cars from other roads are constantly hauled over the road whose employee he is. He must know their cars may be differently constructed.²

2555. It was said a railroad company may not refuse to transport cars with bumpers of an old pattern, not as safe as those with improved bumpers in use on its own road.³

2556. It was said: For a railroad company to receive from a connecting line and transport cars with double buffers or dead-woods in good condition is not negligence, making it liable to a brakeman for an injury received in coupling them, they being in use on other well-managed roads. The generally accepted doctrine is, that railway companies are not bound to use upon all the cars in its possession the safest possible coupling appliances, or appliances of the latest and

¹ Kelley v. Abbot, 63 Wis. 309.

³ Simms v. South Carolina R. Co.,

² Baldwin v. C., R. I. & P. R. Co., 26 S. C. 490.

50 Iowa, 680; Mich. Cent. R. Co. v.

Smithson, 45 Mich. 212

most improved pattern. They are at liberty to use such coupling appliances as are in use at the time by other well-managed roads, and such as are regarded by competent railroad men as ordinarily safe and fit to be used.¹

2557. A railroad company is guilty of no negligence in receiving into its yards and passing over its lines, cars, freight or passenger, different from those it itself owns and uses; and where a brakeman of two months' experience upon the defendant's road was injured while coupling foreign cars with dead-woods or bumpers, and it appeared he had seen and coupled such before, though they were different in this respect from the defendant's cars, it was held that he assumed the risks from coupling all such cars.²

2558. The use and employment of unsafe and defective cars and machinery by a railway company, whether owned by them or not, subjects said company to the same liability for injury resulting from their use, when injury is occasioned by such defects, as though the company were absolute owners of such cars and machinery. This was said with reference to a car with double dead-woods.³

¹ Northern Pac. R. Co. v. Blake, 63 Fed. 45 (C. C. A.).

³ St. Louis & S. E. R. Co. v. Valirius, 56 Ind. 511.

² Kohn v. McNulta, 147 U. S. 238.

CHAPTER XII.

INDEPENDENT CONTRACTOR.

A. *Rule*, 2559 et seq.

B. *Exceptions*, 2563 et seq.

- (1) Where the Work is Wrongful in Itself, or if Done in an Ordinary Manner Would Result in a Nuisance, 2563, 2574.
- (2) If the Work to be Done is in Its Nature Dangerous to Others, However Carefully Performed, 2566 et seq., 2577, 2581.
- (3) Where Injury is Caused by Defective Construction, Inherent in the Original Plan, 2566, 2577.
- (4) Where the Wrongful Act is the Violation of a Duty Imposed by Express Contract Upon the Employer, 2569, 2576.
- (5) Where a Duty is Imposed by Statute, 2570 et seq.
- (6) Where the Employer Retains the Right to Direct the Time and Manner of Doing the Work, 2580 et seq.
- (7) Where Employer Ratifies or Adopts Unauthorized Wrong, 2593.
- (8) Where the Owner Owes a Duty in Respect to the Safety of the Place or Appliance, 2594 et seq.

C. *When an Independent Contractor*, 2600 et seq.

A. *Rule*.

2559. Where one person employs another to furnish the materials and do a specified job of work as an independent contractor, he does not thereby render himself liable for injuries caused by the sole negligence of such contractor or his servants.¹

2560. A party is not chargeable with the negligent acts of another in doing work upon his lands unless he stands in the character of employer to the one guilty of negligence, or unless the work, as authorized by him, would necessarily produce the injuries complained of, or they are occasioned

¹ Hackett v. Western Union Tel. Co., 80 Wis. 187; Hundhausen v. Bond, 36 Wis. 29; Robbins v. Chicago, 4 Wall. 679; Conners v. Hennessy, 112 Mass. 96; Hilliard v. Richardson, 5 N. Y. 48; 3 Gray, 349. See, also, cases cited in Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277.

by the omission of some duty imposed upon him. There is no distinction in this respect between an owner of real and personal property, and the former is held to no stricter liability for the negligent use and management of his real estate, or of negligent acts upon it by others, than is the latter as to a similar use of his property.¹

2561. The master owes to the servant the duty of providing a reasonably safe place to work in and reasonably safe appliances with which to do the work, and the delegation of this duty to an agent or independent contractor will not relieve the master from responsibility for an injury to the servant resulting from its neglect.²

2562. A watchman in an unfinished store building was injured by falling down the elevator shaft. It appeared upon the trial that the elevator was being constructed under contract and was not completed. It was held that the employer was not liable.³

B. *Exceptions to the Rule.*

2563. (1) *Where the work is wrongful in itself, or if done in the ordinary manner would result in a nuisance:* This upon the principle that if one contracts with another to commit a nuisance, he is a co-trespasser by reason of his directing or participating in the work. In other words, the rule is, if the act or neglect which produces the injury is purely collateral to the work contracted to be done, and entirely the result of the wrongful acts of the contractor and his workmen, the proprietor is not liable; but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor.⁴

¹ McCafferty v. Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178; Scammon v. City of Chicago, 25 Ill. 424.

³ Conway v. Furst (N. J. L.), 32 Atl. 380.

² Trainor v. Phil. & R. R. Co., 137 Pa. St. 148.

⁴ Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277.

2564. Though ordinarily the owner of premises (in this case a building in process of erection) is not liable for the acts of an independent contractor who is constructing the building or doing work upon the premises by reason of any relation as master and servant, yet it does not follow that he may not be responsible for the consequences resulting from the defective work allowed to be done by them.

A wall of a building was in course of erection on an owner's premises, by his sanction, under his contract and for his use and benefit. It was immediately fronting on a public street in a large city, and, according to the testimony of the plaintiff, was constructed in a most dangerous and defective manner, so much so that it excited the alarm and apprehension of hundreds of people as they passed, and caused them to avoid the pavement in its immediate front.

It was said: If this be so, it certainly constituted a nuisance for which the owner would be liable. And the fact that the wall was erected by others under contract, and to whom he did not bear the relation of master, will not excuse him. In all cases where a party is in possession of fixed property, he must take care that it is so used and managed that other persons shall not be injured; and whether it be managed by his own servants or by contractors or their servants makes no difference in respect to his liability. If a man has anything to be done on his premises he must take care to injure no man in the mode of constructing the work. Whether he injures a passenger in the street or a servant employed about his work seems to make no difference.¹

2565. A railroad company which has employed an independent contractor to construct its road is not liable for the damages resulting from a nuisance created by such contractor, consisting of a pond on plaintiff's land, the result of failure to drain through an embankment, and the accumulation therein of filth from the camp of the contractor's workmen; the nuisance not being one necessarily incident to the

¹Deford v. State to use of Keyser, 30 Md. 179.

construction of the road, and the railroad company not having retained control over the manner of constructing it.¹

2566. (2, 3) *If according to previous knowledge and experience the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable and not the contractor, because it is said it is incumbent upon him to foresee such danger and take precautions against it. And in this exception is included the principle that when the injury is caused by defective construction which was inherent in the original plan of the employer, the latter is liable.*²

2567. Where the owner of an instrument or piece of machinery, not in its nature dangerous, allows another person competent to manage it to take and use it, and while in the possession and use of the other it becomes defective and injures a third person, the owner is not liable; and the fact that the right to use it was given under a contract by which it was to be used in performing work for the owner upon his premises does not change his liability.

The facts were that defendant made a contract with another to unload iron from vessels upon the former's dock at a fixed price per bar, such owner to furnish a derrick to be used for such purpose. The derrick, while in use, became out of repair, and from its defects injury was occasioned one of the contractor's workmen.³

2568. The defendant caused a scaffold to be erected fifty feet from the ground, to accommodate workmen who should be engaged in putting a cornice on the defendant's building, and made a contract with a firm to put on the cornice. The scaffold, owing to its defective construction, fell while the plaintiff's intestate, a workman employed by the contractors, was upon it, causing his death. It was said: The scaffold was upwards of fifty feet from the ground, and unless prop-

¹ Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277.

³ King v. N. Y. C. & H. R. R. Co., 66 N. Y. 181.

² Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277.

erly constructed would be a most dangerous trap, imperiling the life of any person who might go upon it. That in placing it where they did upon their own premises, for the use of the workmen, they not only licensed, but invited them to go upon it, and impliedly held out to them that it was a safe structure, or at least that proper care had been used in its erection; and these facts, it was held, imposed a duty upon the defendants towards any person who should be invited to go upon the structure, to use proper care in its construction.¹

2569. (4) *Where the wrongful act is the violation of a duty imposed by express contract upon the employer:* For where a person contracts to do a certain thing he cannot evade liability by employing another to do that which he has agreed to perform.²

2570. (5) *Where a duty is imposed by statute:* The person upon whom a statutory duty is imposed is liable for any injury that arises to others from its non-performance, or in consequence of its having been negligently performed, either by himself or by a contractor employed by him.³

2571. The duty on the part of a railroad company of keeping its road, track and yards in a reasonably safe condition is a personal duty which the master owes the servant, and it cannot delegate this duty to any servant, high or low; nor can it avoid liability by letting out a part of its duties as a common carrier to independent contractors. While for many purposes this relation of independent contractor will be recognized, it cannot be sustained to shield the master from those positive personal obligations cast upon him by his relation to his servants.

This was said where the foreman of a train crew was injured by falling over a door left at the side of the track, pre-

¹ Coughtry v. Globe Woolen Co., 56 N. Y. 124.

³ Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277; Railroad Co. v. Waldo, 50 Tex. 77.

² Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277; Water Co. v. Ware, 16 Wall. 566.

sumably by an independent contractor who had the contract for transferring grain. A judgment for plaintiff, however, was reversed on the ground of lack of proof of notice on the part of the company.¹

2572. A railroad corporation does not avoid responsibility for an injury caused by the negligence of the agents or servants of another corporation or of a natural person to whom it may lease or voluntarily surrender its property and franchises without competent authority.²

2573. Where the obstruction or defect created is caused in the street, and is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the master is not liable. But when the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party. Hence it was held that a person could not excuse himself from liability for injuries caused by an opening in the walk left unguarded and unprotected, upon the ground that it was the duty of the contractor to attend to these things, especially where he had been warned by the superintendent of the street of its danger.³

2574. The rule that a person who has entered into a contract for a specific work to be done by another is liable for the act or conduct of the contractor has no application in a case where the thing contracted to be done is unlawful, or where a public duty is imposed upon an officer or public body, and the officer or body charged with the duty commits its performance to another. For instance, whoever directs the doing of an act which when done will necessarily

¹ Burnes v. Kansas City, St. L. & M. R. Co., 129 Mo. 41, 31 S. W. 347. ³ Robbins v. Chicago, 4 Wall. 657; Hundhausen v. Bond, 36 Wis. 29;

² Rome & Decatur R. Co. v. Chas- Pfau v. Williamson, 63 Ill. 16.
teen, 88 Ala. 59; Ricketts v. Bir.
St. Ry. Co., 85 Ala. 601.

be the creation of a nuisance will be personally responsible for a special injury resulting therefrom to third persons, whether the act is performed by a servant or a contractor; and a municipal corporation charged by statute with the duty to keep streets in repair cannot escape liability for a negligent performance of this duty on the ground that the immediate negligence was that of a contractor who had been intrusted with its performance.¹

2575. Where independent contractors, while putting down a stone curb for a county, left the trench and the pile of dirt unguarded and unlighted during the night, and a person fell into the trench receiving injury, it was held there was no liability on the part of the county in the absence of proof of interference with the control of the work by the county. Such interference is not shown by the facts that the commissioners directed, as the contract provided, that the dirt should not be thrown on the grass, and furnished boards on which the dirt might be temporarily deposited to protect the pavement, or that they directed certain things that did not suit them, or if they thought it would be better they would give directions.²

2576. Where a water company obtained a franchise to dig trenches and lay pipes in the streets of a city, and afterwards contracted with others to dig and fill the trenches at a specified price per hundred feet, and by reason of not properly guarding the work a traveler was injured, it was held, in an action brought against the contractors, that they were liable; that they could not relieve themselves from responsibility for the manner in which the work was done by letting the work to independent contractors; that they could not lawfully lay pipes in the streets without consent of the city; that such consent merely relieved them from the unlawful character of the work; they stand in a contract relation to the public, to do the work in the manner required by the ordinance, and cannot relieve themselves from the

¹King v. N. Y. C. & H. R. R. Co.,
66 N. Y. 181.

²Eby v. Lebanon County, 166 Pa.
St. 632, 81 Atl. 332.

duty imposed by that contract by contracting with another to do the work.¹

2577. The plaintiff was injured by his horse becoming frightened at the operation of a steam drill which was being used in connection with and for the purpose of aiding in making an excavation in a street in a city to be used for the purpose of laying water pipes. The work was being prosecuted pursuant to an engagement with the city by the defendants, and the control of the work was by an independent contractor of the defendants. The principal question discussed was whether the city itself was liable, as upon a decision of that question was predicated the question of the liability of the defendant, the water supply company. The liability on the part of the city may be placed on the ground of its duty to keep the streets in a reasonably safe condition for travel, and this duty will not be excused, ordinarily, because the act or omission to keep it safe is that of an independent contractor.

It was said: Improvements of the kind, such as making excavations and laying pipes for gas or sewers, are made by municipal corporations under circumstances where the corporation is immediately responsible for the defect or want of repair in the street without any other party being answerable over to them for any damages they may have to pay to a traveler who may be injured through such defect or want of repair, as where they appoint their own superintendent and the work is done by their order and directions. Other cases arise where improvements are constructed by contractors in which the municipality is not responsible at all, as where the improvement is of such a character that a prudent man would not find it necessary to incumber the street in any respect or for any purpose, as in that case it would be clear that the defect or want of repair which occasioned the injury was solely the result of neglect and carelessness on the part of the contractor, and not of any culpable fault of the officers of the municipality. Contractors

¹ Colgrove et al. v. Smith et al., 102 Cal. 220, 36 Pac. 411.

with such a corporation for such a purpose may or may not be responsible to a third party, in a case like the present, according to the circumstances. Tested by these considerations, it is quite clear that the case must be viewed just as it would be if the work had been done by the defendants, and not by the subcontractors, or as if the work had in all respects been done under the direction of the defendants as the immediate contractors with the municipal corporation.

Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful act of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party.¹

2578. Section 2692 of the Georgia Code declares: "The employer is not responsible for torts committed by his employee, when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer." This rule is simply declaratory of the common law. Where a street railway company, having authority under its charter to construct a railroad in the public street, does the work by an independent contractor, and injury is occasioned a traveler by the negligence of employees of the contractor, the contractor will be personally liable, but in the absence of reservation of control over the work the railway company will not. The circumstance that the work is being done in a public thoroughfare will not affect the rule. The rule applies to all independent contractors, regardless of whether the work is to be performed in a thoroughfare where public rights are involved, or in a place where private rights only are affected.²

¹St. Paul Water Co. v. Ware, 16 Wall. 566.

²Fulton County St. Ry. Co. v. McConnell, 87 Ga. 756, 13 S. E. 823.

2579. The principle that a railroad company cannot delegate to an employee its chartered rights and privileges so as to exempt it from liability does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without first having complied with the conditions of the legislative grant of authority.¹

2580. (6) *Where the employer retains the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming the control of the work or some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference:* But merely taking steps to see that the contractor carries out his agreement, as having the work supervised by an architect or superintendent, does not make the employer liable; nor does reserving the right to dismiss incompetent workmen.²

2581. The owner of a building cannot dictate that it be constructed of improper materials or upon an improper plan and escape liability for injuries occasioned thereby because he made a contract with a third person to build it. Nor can such owner, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it and shift all responsibility upon the builder.

It was said: It seems quite clear from the evidence that the defendants reserved no control over the erection of the building after they let the contract, and to this extent the builder was an independent contractor. But this fact does not of itself relieve the defendants from all liability. There was ample evidence tending to show that the defendants consulted with the builder and determined on the materials and plan of construction before the contract was let, especially as to the single top plate, the builders' testimony

¹Atlanta & F. R. Co. v Kim-berly, 87 Ga. 161, 13 S. E. 277.

²Atlanta & F. R. Co. v. Kim-berly, 87 Ga. 161, 13 S. E. 277.

being that the defendants said, "Single-top plates we guess will do."

The facts were that the defendants set a man at work under a newly-built ice-house which was being filled with ice, and while in such situation the building collapsed, either from the effects or method of piling it with ice or the insecure manner in which it was constructed, or from these causes combined.¹

2583. A corporation organized for the purpose of constructing and operating a railroad, having acquired its right of way by the exercise of the power of eminent domain or otherwise, may contract with another person for the construction of the whole or any part of the road without retaining the right to control the mode or manner of doing the work, and in such case the corporation is not liable to third persons for an injury resulting from the carelessness or wilful act of the contractor. But if the corporation retain control over the mode or manner of doing the work, the relation of independent contractor does not exist, and the employer is liable for an injury to third persons for the carelessness or wilful wrong of the contractor while engaged in the performance of the work.

A right reserved in the contract on the part of the railroad company to direct as to the quantity of work to be done or the condition of the work when completed is not a right to control the mode or manner of doing the work within the rule above stated.

Where an employee retains control over the mode and manner of doing a specific portion of the work only, and an injury results to a third person from the doing of some other portion of the work, the contractor alone is liable.²

2584. Yet it was held in another jurisdiction, where a railroad corporation made a contract with certain persons that the latter should build a certain portion of the railroad,

¹ *Meier v. Morgan et al.*, 82 Wis. St. 461; *City of Cincinnati v. Stone*, 289. 5 Ohio St. 38.

² *Hughes v. Railway Co.*, 39 Ohio

and while engaged in such work some rocks were blasted, throwing a piece upon the plaintiff, causing him injury, that the plaintiff might maintain an action against the corporation to recover damages for the injury he sustained. It was said: The contractors were in the immediate employment of the defendants. It is entirely immaterial whether the contract is written or verbal; the contractors were none the less servants of the defendants though there was a written agreement between the parties, setting forth with precision what each party was to do. The sole object of the corporation was to build a railroad; this they might do either by employing laborers by the day or by contracting with different persons to construct different sections of the road; the defendants employed the persons that did the injury.¹

2585. Where the employer reserves to himself no control over the manner in which the work shall be performed, except that it shall conform to a certain standard when completed, he will not be liable for an injury sustained during the progress of the work by a servant employed by the contractors' foreman.²

2586. The plaintiff was injured while working upon an air-shaft intended to be connected with the defendant's mine. At the time of the accident the connection had not been made. The plaintiff was in the employ of a third party who had the contract for the construction of the air-shaft. The defendants had nothing to do with the work, except they reserved the right to supervise the work so far as to see that the contract was complied with. It was said the plaintiff's remedy, if any, was against the contractors. He had none against the owners.³

2587. The plaintiff was injured by a barrel of sugar being rolled against him as he was passing in front of defendant's

¹ *Stone v. Cheshire Railroad Corporation*, 19 N. H. 427. *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94.

² *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747; ³ *Welsh v. Parrish et al.*, 148 Pa. St. 599, 24 Atl. 86; *Welsh v. Coal Co.* (Pa. St.), 5 Atl. 48.

store. It appeared that the person who thus rolled the barrel was a truck-man in the employ of a company engaged in carting goods, and who had a contract with the defendant to furnish its trucks, teams and men and do all its cartage at a certain price per year. The defendant did not hire the men and had no power to discharge them. It was held that the defendant was not liable.

To the argument on the part of the plaintiff that the testimony showed that the defendant gave direction to the men how to handle the freight, and consequently the men were under the immediate charge and control of the defendant, and for any acts of negligence of the men the defendant became liable, it was said the testimony did not support plaintiff's assumption. The defendant simply pointed out the goods that were to be carted to their destination. It did not control the manner in which they should be transferred to the trucks nor the route that should be taken in taking them to their destination.¹

2588. An action was brought by a gaslight company against a borough to recover for alleged injuries to its pipes by the defendant while constructing a system of sewers. It appeared the work was let by contract; and in the process of the work the damage was occasioned by the caving in of the sides of a trench. It appeared by the terms of the contract that the city engineer had, in substance, the right to compel the work to be done in a proper manner and to have proper materials used. It was said: The weight of authority justified the holding that the reservations of control, being but partial and existing in certain respects only, did not prevent the existence of the relation of contractee and independent contractor; that the general control over the work as to the manner and method of its execution, the oversight and direction of the performance of the actual manual labor, especially in the particulars in the execution of which the plaintiff claims injury to his property was caused, notwith-

¹ *Biedel v. Moran-Fitzsimons Co.*, 103 Mich. 262, 61 N. W. 509.

standing the prescribed limitations, remained in the contractor; that the servants doing the work were his servants, not those of the defendant, and that these considerations relating to general control constitute the true test by which to determine whether the relation be that of employer and contractor or that of master and servant.

It is not the fact of actual interference and control, but the right to interfere, which makes the difference between the independent contractor and a servant or agent. But when the relation is that of independent contractor, it is correct to say that the liability of the contractee in such cases arises from the fact of actual interference and control.¹

2589. An owner about to build contracted with one to dig the cellar, who employed his own assistants, horses and carts; with another to do the masonry, the owner furnishing the lime, stone, etc.; with a third to put up the superstructure. The excavation not being sufficiently guarded, the plaintiff fell in and was injured. It was held the owner, and not the contractor, was liable. Where the contract is split up into different contracts, and the owner undertakes to supply the materials, and no provision is made for the supervision of the work or maintaining guards, the duty is on the owner to protect the public.²

2590. The defendant railroad company made a contract with an individual by which he was to take entire charge and control of defendant's freight business at St. Louis station, loading and unloading cars, switching them back and forth in the yard, making up freight trains, and doing all other yard service necessary in the transaction of the defendant's freight business. Certain other duties were imposed upon him not material to the consideration of the question. To enable him to properly discharge his duties he was to have control over the grounds, yards, buildings, engines and cars of the defendant at the station. Defend-

¹ Norwalk Gas Light Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32.

² Homan v. Stanley, 66 Pa. St. 464.

ant was to furnish the necessary engines, and keep them in repair and supplied with fuel, etc., and to employ the engineers and firemen, who were to be under the control of the contractor and were to be paid by him. For his services he was to be paid monthly at the rate of fifteen cents for each ton of freight received or delivered, and fifty cents for each car hauled from the levee. The contract was to continue five years. The business was to be done under the control of defendant's superintendent and to his satisfaction, and, if not so done, defendant could revoke the contract on twenty-four hours' notice.

An employee of an elevator company was injured, as was alleged, through the negligence of men operating cars. In an action brought for damages against the railroad company, it was held that such contractor was not an independent contractor, but stood in the relation of a servant to the defendant. The right reserved to the defendant to supervise and control the manner of doing the work determined this conclusion. Doubt was expressed as to the power of a common carrier to let out its work and duties so as to relieve itself from responsibility.¹

2591. The reservation to the employer of the privilege of inspecting and supervising the work of the contractor does not impair or destroy his character as an independent contractor. Hence, where a railroad company employed for an agreed price a skilful contractor to repair, according to specifications and with the privilege reserved of supervision by its engineer, a bridge in such a manner that the passing of trains should not be prevented, but they were not to pass except upon signal from the contractor's foreman, and a passing train broke through the bridge, killing one of the servants of the contractor working thereon, it was held that the railroad company was not liable.²

2592. The fact that the general contractor sublets a part of the work embraced in his contract, and stipulates that the

¹Speed v. Atlantic & Pacific R. Co., 71 Mo. 303.

²Bibbs, Adm'r, v. N. & W. R. R. Co., 87 Va. 711.

work is to be done in a thorough and workmanlike manner to the satisfaction of its chief engineer, will not be such an assumption of the right to control as to the details or method of doing the work as will make him responsible for wrongs of such subcontractors or their servants. Such a provision is nothing more than is usual and necessary to enable the employer to see that the work contracted for is carried out, and neither implies nor authorizes any such control of the details as would make the contractor his servant.¹

2593. (7) *Where the employer has ratified or adopted the unauthorized wrong of the independent contractor he may be liable.*²

2594. (8) *Where the owner owes a duty in respect to the safety of the place or appliance:* Where the contractor agreed with the owners of a mine to do certain work therein, the owners engaging to furnish and put up such props or supports for the roof of the mine as would render the miners secure whenever notified by the contractor that the same were necessary, it was held that, although such notice from the contractor may not have been received by the owners, if they had actual knowledge that such supports were necessary they became liable in damages to an employee of the contractor, who, without negligence on his part, had been injured while at work in the mine through the want of such support for the roof. It was said that such liability would exist, not by virtue of any privity of contract between the contractor and the owner, but independently of the contract, the work being done through the firm's own procurement, for their own use and benefit and upon their own premises, over which they retained a superintendency for the miners' protection, and they owed a duty towards the

¹ Powell v. Virginia Const. Co., 202; Crenshaw v. Ullman, 113 Mo. 88 Tenn. 692, 13 S. W. 691; Pack v. 633, 20 S. W. 1077.

New York, 8 N. Y. 222; Erie v. ² Atlanta & F. R. Co. v. Kim-berly, 87 Ga. 161, 13 S. E. 277.
Caulkins, 85 Pa. St. 247; Clark's
Adm'r v. H. & St. J. R. Co., 36 Mo.

contractor's servants to keep the premises in a reasonably safe condition.¹

2595. A firm of contractors made a contract with the defendant to put a cornice on its mills and any scaffolding required for that purpose free of cost to them. A workman in the employ of the contractor, while engaged in the work, was killed by the fall of the scaffold erected by the defendant for that purpose. It was held that, the scaffold being erected by defendant upon his own premises for the express purpose of accommodating workmen, a duty was imposed upon it toward them to use proper diligence in constructing and maintaining the structure, and that this duty existed independently of the contract.²

2596. Where a mining corporation contracting for the removal of ore reserved to itself such arrangements as were necessary for the protection of workmen, it was said that it was liable for such injuries as might happen to the employee of the contractor without the fault of the employee. It was said: "Legal privity may sometimes exist between one contracting party and the servants of another, as where the servants are exposed to it from being obliged to work upon the former's premises under an arrangement which binds him to keep the premises in a safe condition."³

2597. A contractor contracted to paint the inside of the dome of a court-house, and, having no experience in building scaffolds or knowledge of that business, he made a contract with an experienced scaffold builder to erect the necessary scaffolding, which was to be first-class. Through the negligence of such builders the scaffolding was defectively constructed, and in consequence an employee of such painter, while at work upon the scaffold, was injured by its giving way. It was held that such scaffold builder was an independent contractor, for whose acts the painter was not liable, and that it was not negligence for him to rely upon the

¹ Kelly v. Howell, 41 Ohio St. 438.

³ Lake Superior Iron Co. v. Erick-

² Coughtry v. Globe Woolen Co., son, 39 Mich. 492.
56 N. Y. 124.

judgment of such scaffold builder as to its sufficiency as a scaffold; and it was held the contractor was liable, although there was no privity of contract between him and the plaintiff. They contracted to build the structure for the workmen of the painter, and any defect which would cause it to give way would naturally result in injury to such workmen; and he owed to them a duty to use proper diligence independent of his contract.¹

2598. The doctrine was applied where one delivering lumber to a subcontractor for part of the work upon a bridge was injured by a span of the bridge falling because it was too light, while he was delivering lumber upon it. It was said: In the absence of an express stipulation there was an implied obligation or duty resting upon the defendants that they would use due care in the construction of the bridge, so that subcontractors under them and their servants employed in other parts of the work should not be exposed to risk of injury while engaged in the due course of their employment, by reason of any neglect or want of reasonable care on their part in building that portion of the structure which was to be made and erected by them. The privity is formed in the relationship growing out of the contract. A person in entering into a contract takes upon himself the usual and ordinary risks of the business in which he is thereby employed, including the negligence of others in the same service. But the law does not relieve him from all responsibility with those with whom he contracts. He is bound to use due care in the selection of those whom he employs to work in company with others, and to be reasonably cautious and diligent in obtaining proper materials, in the erection of adequate structures, and in the procurement of suitable tools, machinery or other instrumentalities by which the work is to be carried on.²

2599. Where a contractor with a city for the construction of a sewer sublet the brick work to another, and a serv-

¹Devlin v. Smith et al., 89 N. Y. 470; ²Curley v. Harris et al., 11 Allen, 112.
105.

ant in the employ of the latter was injured by the sides of the trench caving in, in an action brought against the contractor it was said: The contractor excavated the trench and prepared it for the brick work. It was the brick work only that was sublet. It was the duty of the contractor to so prepare the trench as to make it reasonably safe for the subcontractor and his employees.¹

C. When an Independent Contractor.

2600. One who contracts to do a specified piece of work, furnishing his own assistants and executing the work either entirely in accord with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the order of the latter in respect to the details of the work, is clearly a contractor and not a servant, and a person injured by his negligence in the performance of the work would have no right of action against the party for whose benefit the work is done.²

2601. An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished.³

2602. One who contracts with a furnace company to take sand from its land and to deliver it at its furnace at an agreed price per load, there being no stipulation as to the manner of digging the sand, is an independent contractor, and the company is therefore not liable for his negligence in conducting the work.⁴

2603. Where work which does not necessarily create a nuisance, but is in itself harmless and lawful when carefully conducted, is let by an employer who merely prescribes the end to another, who undertakes to accomplish that end by

¹ Johnston v. Ott et al., 155 Pa. St. 17, 25 Atl. 751.

For other cases see RELATION.

² Hale v. Johnson, 80 Ill. 185.

³ Fink v. Missouri Furnace Co., 82 Mo. 276.

⁴ Fink v. Missouri Furnace Co., 82 Mo. 276; Bibbs, Adm'r, v. N. W. R. Co., 87 Va. 711.

means which he is to make use of at his discretion, the latter is in respect to such means the master, and if a third person is injured by the negligent use thereof the employer is not answerable.

The rule was applied where a railroad company employed an owner of a portable engine to pump water out of the way of an excavation it was constructing and the engine frightened a horse on the highway. It was further held that using such an engine close to a highway did not necessarily create a nuisance.¹

2604. An independent contractor is one who exercises an independent employment,—who contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to results of his work.²

2605. The rule of *respondeat superior*, as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and to the subjects to which that relation extends, and is co-extensive with it, and ceases when the relation itself ceases to exist. It is founded on the power which the superior has a right to exercise, and which for the prevention of injuries to third persons he is bound to exercise over the acts of his subordinates. Therefore the rule cannot be applicable to cases where no such power exists. Hence it was held that a person who had let a contract to build a sewer was not liable for the negligence of the contractor or his servants in the manner of doing the work.³

2606. In order to establish the liability of one person for an injury caused by the negligence of another, it is not enough to show that the latter was at the time acting under an employment by the former; it must be shown in addition that the employment created the relation of master and servant.

¹ Wabash, St. L. & Pac. R. Co. v. Farver, 111 Ind. 195.

² Powell v. Construction Co., 88 Tenn. 692.

Where a defendant employed a person engaged in the roofing and cornice business to make some repairs to the cornice of his building, no price or plan being agreed upon, the method and means being left entirely to such person so employed, who agreed simply to remedy the defect, and a person was injured by the fall of a plank from a scaffold erected by the latter's employees in doing the work, it was held that the relation of master and servant did not exist between the defendant and the person so engaged to make the repairs, but that the latter was an independent contractor; the men employed to do the work were his servants and not servants of the defendants; and that it was immaterial that the work was charged for by the day.¹

2607. Where the master employs an independent contractor to perform a specified piece of work, and furnishes his own general servant, being a competent person, to aid the contractor and be under his exclusive control and direction in the performance of that particular work, the contractor and not the general master is responsible for the acts and negligence of the servant thus engaged.²

2608. The distinction upon which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance to a contract with his employer, by which he has agreed to do the work on specified terms in a particular manner and for a specified price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer and given to the contractor. But, on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the

¹ *Hexamer v. Webb*, 101 N. Y. 377.

² *Powell v. Construction Co.*, 88 Tenn. 692.

time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient.¹

2609. The owner of a house by a parol agreement employed a carpenter to raise and put another story under the building, the carpenter agreeing to raise it, furnish the material and complete the alteration to the satisfaction of the owner for a fixed sum. It was held that the relation of the parties was that of contractor and contractee, and not that of master and servant, and that the owner was not liable for the acts or negligence of the carpenter in the performance of the work, which caused the fall of the house upon the horse of the plaintiff, unless the carpenter was without proper skill or was unsuitable to do the work, or unless the work contracted for was a nuisance.²

2610. The rule of *respondeat superior* does not apply where the party employed to do the work, in the course of which the injury occurs, is a contractor, pursuing an independent employment, and by the terms of the contract is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done. In such case the workmen employed by the contractor are his servants, and he is liable for any negligence or unskilfulness in the course of their employment, and not the party engaging the contractor to do the work.

This rule was applied where the owner of a lot employed an architect to draw plans and superintend the erection of a building thereon. He drew a plan to which the owner assented. The owner paid the architect a commission on the value of the building. The architect had no other interest in the work. The owner paid for the materials and the bills for all the workmen upon orders from the archi-

¹ Brackett v. Lubke, 4 Allen, 138; ² Connors v. Hennessey, 112 Mass.
 Connors v. Hennessey, 112 Mass. 96.
 96; Rome & Decatur R. Co. v. Chas-
 teen, 88 Ala. 591.

tect. The architect employed a master bricklayer, and employed the journeymen bricklayers and hod-carriers. While the building was in course of erection, the cornice and a portion of the front wall fell upon a person passing on the street. At this time neither the owner, architect nor master bricklayer was present. It was held that the architect and master bricklayer occupied the position of independent contractors, as contradistinguished from servants; that the journeymen bricklayers and hod-carriers, having been employed by the master bricklayer, were his servants, and not those of the owner of the building.¹

2611. An agreement between a railroad company and an individual was that the latter should complete the unfinished contract of an independent contractor, and was to be paid for it what the materials and labor to be procured and furnished by him should cost and ten per cent. additional to that for his compensation. It was said that the mode of payment is a circumstance of much weight in solving the question of the character of one as an employee or contractor; but it is not decisive and should not have been made so. If such person was engaged as the mere instrument through whom the appellant was to procure materials and labor to be paid for by the company—in other words, if he was a disbursing agent and to be paid for his services a compensation measured by his disbursements,—he was its agent and it is responsible for its acts as such.²

2612. A person employed by a railroad company to clear off and burn the rubbish from its right of way at so much per mile, who hires, pays and controls his own help, is not a servant of the company, but an independent contractor; and the railroad company is not liable for the negligence of his employees.³

2613. A construction company engaged in building a railroad made a subcontract for the construction of the road

¹ Deford v. State to use of Keyser, 30 Md. 179.

³ St. Louis, I. M. & S. R. Co. v. Yonley, 53 Ark. 503, 14 S. W. 800.

² New Orleans & N. E. R. Co. v. Ruse, 61 Miss. 581.

from a given point as far as the company's chief engineer might determine, the company to furnish a locomotive and train, with engineer, fireman and brakeman for the use of the subcontractor in such work. One of the employees in the general employ of the defendant, but who was one of the crew operating the train under the direction and control of the subcontractor, was injured through the alleged negligence of such subcontractor. It was held that while engaged in such work the subcontractors were independent contractors, for whose negligence in the management of the train the construction company was not liable.¹

2614. Where defendant employed a person to fill its ice-house and furnished him with an apparatus by which the ice was hoisted, the defendant was held not liable to an employee for injuries resulting from the inexperience of such employee's fellow-servants in working such apparatus.²

2615. Where an individual was engaged in delivering coal for the defendant fuel company at a stipulated price per load with his own team and wagon, except the box, he was held to be a servant of the company and not an independent contractor. The precise ground upon which this conclusion was placed is not disclosed.³

2616. An ore digger who furnishes his own tools and appliances, who employs and pays his own assistants, and who is paid by the mine-owners a specified per cent. for ore mined by him, is not a servant of the mine-owners, but an independent contractor, as the means and details of the execution of his work are subject to his own exclusive control and management, and hence the wrongful employment by him of an infant does not render the mine-owners liable to the infant's parents for his death. The fact that, in practice, the ore diggers would discharge their hands, on request of the mine-owners, for refusal to observe the rules of the

¹ Powell v. Virginia Const. Co.,
88 Tenn. 692, 13 S. W. 691.

³ Waters v. Pioneer Fuel Co., 52
Minn. 474.

² Piette v. Bavarian Brewing Co.,
91 Mich. 605, 52 N. W. 152.

mines, and that the mine-owners objected to the hiring of a certain class of assistants by the ore diggers, does not show such reservation of control as creates the relation of master and servant between them and as will constitute the assistants thus employed servants of the mine-owners.¹

2617. Where an employee was injured while riding upon a load of logs being hauled upon a private logging road, and there was a theory, fairly deducible from the evidence, that the cause of the injury was the improper manner in which the logs were loaded, and it appeared the logs were loaded by an independent contractor, it was held to be error to refuse to submit the question to the jury.²

¹Harris v. McNamara, 97 Ala. 181, 12 So. 103.

²Haley v. Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321.

CHAPTER XIII.

INSPECTION.

- A. *Rule*, 2618 et seq.
- B. *When Required*, 2623 et seq.
- C. *Defects from Age and Long Use*, 2634 et seq.
- D. *Character and Sufficiency of the Inspection and Tests*, 2638 et seq.
- E. *Duty Personal to the Master*, 2651 et seq.
- F. *Contrary Rule*, 2654 et seq.
- G. *New Appliances and Defects in Construction*, 2656 et seq.

A. *Rule.*

2618. In order to keep machinery and appliances in repair, the law makes it the duty of the master to make all needed inspections and examinations, and he cannot escape responsibility by delegating this duty to one who in other respects may be a fellow-servant of the one injured.¹

2619. The duty of the master is to adopt or apply all reasonable and usual tests to discover defects.²

2620. As incident to the duty of maintaining appliances in a reasonably safe condition for use, especially as applied to the operation of cars, a most efficient and perhaps a necessary method of discharging this duty is to maintain a careful system of inspection to see that appliances in use are in good order and sufficient to answer the purposes for which intended.³

2621. A mere failure to inspect cars or appliances is not negligence unless it further appears that in the proper exercise of that duty the actual defect which caused the injury would have been discovered. Nor does it change the burden of proof from the plaintiff to the defendant to show

¹ Van Dusen v. Letellier, 78 Mich. 492; Wedgewood v. C. & N. W. R. Co., 44 Wis. 44; Bowen v. C., B. & K. C. R. Co., 95 Mo. 268.

² Smith v. C., M. & St. P. R. Co., 42 Wis. 520.

³ Sack v. Dolese, 137 Ill. 129, 27 N. E. 62.

proper construction or no defect which proper inspection would have disclosed. The rule is that the plaintiff must show that the master either knew or ought to have known of the defect.¹

2622. A railroad company is not required to keep a constant watch on every part of its road, but only to inspect at reasonable intervals. This was said where an employee was injured by stepping upon a small spiral spring near the track, and independent of the proposition that an inspection might have discovered it.²

B. When Required.

2623. A railroad company was held liable to an employee who was injured by a bridge-guard or tell-tale being out of order. It did not appear that the company had noticed that the rope had broken which held the device in position, nor that it had been broken for such length of time that notice would be presumed, but there was evidence sufficient to sustain a finding that the company had not used due care in the examination of the device as to its condition, where if such care had been exercised it would have led to a discovery of the defective condition of the rope.³

2624. Where an employee was injured by the sudden starting of an engine, which might have been caused by the throttle-valves being leaky, and it appeared that the defendants had not caused the inspection of this part of the appliance, although the engine was somewhat old and had been overhauled, it was held a question for the jury whether there was negligence on its part in not discovering it.⁴

2625. Following a blast in a mine large quantities of ore were thrown upon a platform or scaffold used in a place in

¹ *Sack v. Dolese et al.*, 137 Ill. 129, 27 N. E. 62; *Chicago, C. & I. R. Co. v. Troesch*, 68 Ill. 645; *Chicago & Alton R. Co. v. Platt*, 89 Ill. 141; *E. St. L. P. & P. Co. v. Hightower*, 92 Ill. 139.

² *Williams v. St. L. & S. F. R. Co.*, 119 Mo. 316.

³ *Warden v. Old Colony R. Co.*, 137 Mass. 204.

⁴ *Connors v. Durite Mfg. Co.*, 156 Mass. 163.

the mine. This was not an infrequent occurrence. It was said that it was a duty on the part of the officers of the company working the mine to cause an inspection and examination to be made of such scaffold and the timbers supporting it, after blasts, to see whether they had become damaged or weakened.¹

2626. Ignorance by the master of defects in the instrumentalities used by his servants in performing his work is no defense to an action by a servant who has been injured by them, where by the exercise of proper care the master could have discovered and remedied the defects. This was said where the liability of a master for injury to an employee was involved, the injury being caused by the breaking of a defective board in a platform which such employee had no opportunity to inspect, and where the defect was open to discovery by the master by proper inspection.²

2627. It was held proper to show that it was not a custom to inspect cars coming from a certain direction at an important termini, in connection with proof that an inspection at such point was required for the protection of employees, as it might tend to show that proper rules for inspection had not been provided.³

2628. Where an employee while dressing stone was injured by the explosion of a dynamite cartridge which had failed to explode at the time of quarrying, and it appeared that occasionally such a condition existed, it was held a proper question for the jury to determine whether the employer, from the knowledge he possessed, ought to have examined the stone which he provided his employees to dress, to ascertain whether it contained unexploded cartridges.⁴

2629. It was said that an elevator needs and should have constant care and inspection. The friction of the ropes is

¹ Eddy v. Aurora Iron Min. Co.,
81 Mich. 548.

² Benzing v. Steinway & Sons,
101 N. Y. 547.

³ Coffee v. New York, etc. R. Co.,
155 Mass. 21.

⁴ Neven v. Sears, 155 Mass. 303.

constantly wearing the strands, and when they part it is necessarily weakened.¹

2630. Where a brakeman was injured while upon a down grade by reason of the pin holding the brake-rod in place having come out, it was held these facts presented a case for the jury as to the defendant's negligence. That from certain conditions existing, a proper inference might be drawn that the pin was out when the train left the starting point, and, if such was the fact, a proper inspection would have discovered it.²

2631. Yet it was held in another case that brakemen must ascertain for themselves whether brakes are in proper condition before descending a grade, and neglect so to do is negligence preventing a recovery in case of injury.³

2632. A railroad company is bound to see to it, at the proper inspection station, that the wheels of the cars in a freight train about to be drawn out upon the road are in a safe and proper condition.⁴

2633. A railway company must have its repair shops to maintain its tools, rolling-stock, etc., in good repair, and it must have its inspectors, not only at its termini, where a general overhauling of property is had, but at convenient stations along its line to detect such injuries as may have been received *en route*.⁵

2633a. Where, in erecting a telegraph pole, it became necessary to use temporarily, for the purpose of removing an obstructing wire, a telephone pole belonging to another company, an employee injured in climbing the pole by direction of one in charge of the work, by reason of its being defective, cannot be heard to claim that the master was negligent in failing to inspect such pole prior to its use. The

¹ *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446.

² *Bailey v. R., W. & O. R. Co.*, 139 N. Y. 302.

³ *La Croy v. Railway Co.*, 132 N. Y. 570.

⁴ *Union Pacific R. Co. v. Daniels*, 152 U. S. 684.

⁵ *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467.

risk was incidental to the service and was assumed by the employee. If he was unwilling to incur the risk he should have insisted on an inspection of the pole before climbing it.¹

C. Defects from Age and Long Use.

2634. Ordinary care requires that a master should take notice of the liability of parts of machinery to decay from age and to wear out by use, and make provisions for such contingencies. This was said in reference to a rope controlling the operation of a cut-off saw in a factory.²

2635. It was held that a railroad company by proper inspection ought to have discovered that the stringers of certain cars were defective in being somewhat decayed, and that the use of such cars was negligence. This was held where it appeared that a brakeman was injured while in the act of stopping cars, one of which was thus defective, which had got beyond control, and, colliding with other cars, the stringers broke on the defective car.³

2636. Whether an employer was negligent in not ascertaining that a chain which operated or held an elevator, the chain having worn thin and thus becoming so unsafe that it broke, letting the elevator fall, was held a proper question for the jury.⁴

2637. Engines and other appliances used in operating a railroad are liable to wear out, to break, to become defective and dangerous, and a railroad company employing such agencies is charged with notice of this fact, and consequently is bound to exercise a degree of watchfulness over them commensurate with the nature of the business in which they are employed, and the consequences incident to neglect. Therefore if a company fails to make frequent examinations of its appliances, or fails to take other precautions necessary

¹ *Dixon v. Western Union Tel. Co.*, 71 Fed. 143.

² *Indiana Car Co. v. Parker*, 100 Ind. 181.

³ *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286.

⁴ *Hackett v. Middlesex Mfg. Co.*, 101 Mass. 101.

to prevent their becoming so defective and dangerous from natural causes, and if from such defects, which might have been known by the use of ordinary care, injury happens, such omissions would be regarded as negligence. Hence, where it appeared that an employee's injuries were occasioned by an engine moving while he was working under it, caused by a leaky throttle valve, it was held the company was negligent in not discovering the defect and repairing it.¹

D. Character and Sufficiency of the Inspections and Tests.

2638. Where an employee was injured by a defect in a brake-rod, and it appeared that proper care was exercised in its construction, but that while in use it had become defective, which defect would have been discovered upon an ordinarily careful inspection, which defendant failed to make, and both plaintiff and defendant were in fact ignorant of the defect, and plaintiff had no opportunity to ascertain it, it was held that negligence on the part of the defendant was proven.²

2639. It was said: A master who puts a tool or implement into his servant's hands may procure it in several ways. He may buy it ready made of a dealer, procure it to be manufactured, or purchase the material and manufacture it himself. Liability for an injury resulting from a defect in the material or tools will be determined by the same rule in each case. If a hook (like the one used in the present case) had been procured in the ready market or had been manufactured at a foundry, the defendant would certainly have been compelled to rely upon the dealer or manufacturer for the quality of the materials used. A completed hook ready for use could neither be cut into with a chisel or bent over an anvil without impairing its strength or perhaps destroying it altogether. A test of that character of one of a lot would be no guaranty of the quality of the others. To

¹ Atchison, T. & S. F. R. Co. v. Holt, 29 Kan. 149.

² Johnson v. Richmond & D. R. Co., 81 N. C. 453.

apply such a test, therefore, to tools procured in that way is impracticable, and such tools are not usually tested before put in use. The modern industrial system rests upon confidence in others. A railroad company cannot well apply such tests to the materials of which its cars and engines are made, or to the rails of which its tracks are made. Reasonable inspection is necessary and required. But where articles are manufactured by a process approved by use and experience, and apparently properly finished and stamped, it is not usual for them to be tested again as to quality, and such examinations are not generally required by law. If materials of the best quality are purchased, and tools constructed from them by competent and skilful workmen; if there is nothing in the appearance of the material to indicate inefficiency, men in the ordinary affairs of life use them and place them in the hands of their servants.¹

2640. An employee was injured by the breaking of a brake-rod upon a car. It was practically a new car. The defect was latent, disclosed after the accident to be a crack or flaw in the iron. It appeared the company made use of and applied to the car in question all the tests which were used and adopted by railroad companies generally. It was held that the company had fully performed its duty in the premises. That it did not appear that the defect would likely be discovered by the usual examination. It was said: "It would undoubtedly be impracticable to apply tests to every brake-rod which is used upon cars, and, if compatible with the nature of the business, would be of doubtful utility. There should be at least some testimony tending to show that the tests were inadequate and not in accordance with the most approved methods."²

2641. Where an injury was occasioned an employee caused by the breaking of a defective brake-rod, the defect consisting of a flaw or crack more than half way through, made apparent upon examination of broken ends, and there was

¹Carlson v. Phoenix Bridge Co.,
132 N. Y. 273.

²Smith v. C., M. & St. P. R. Co.,
42 Wis. 520.

evidence that, upon making a careful test by striking it with a hammer, the defect might have been disclosed to a skilful inspector, a finding in effect that the defect would have been discovered by a proper and ordinary inspection was sustained and the defendant held liable upon the ground of negligence in not discovering it.¹

2642. Where the duty of the company to a passenger was involved, an injury having been caused to him by a flaw in an axle upon a coach, which might have been discovered upon minute inspection, but was not in fact discovered by such an examination as was customary and reasonably practicable, it was held that no negligence could be imputed for not making a more minute examination than was made. The court stated that it was not within the province of the jury to lay down rules of their own which imposed duties beyond the usual practice of prudent railways.²

2643. Where a line-man in the employ of a telegraph company was injured by a cross-bar breaking from his own weight, and it did not appear from external appearances that there was any defect discoverable by ordinary inspection, and it did appear that the company had a system of inspection as to such arms when purchased, it was held that negligence could not be inferred.³

2644. It is the duty of a railroad company not only to furnish reasonably well-constructed and safe machinery and appliances for the use of employees operating its road, but to exercise a certain supervision over them to keep them in proper repair. The court cannot say, as a matter of law, when, where and how often inspection should take place. This is a question for the jury. It was held that whether a defect in the hand-hold of a foreign car ought to have been discovered was proper for the jury.⁴

¹ *Cowan, Adm'x, v. C., M. & St. P. R. Co.*, 80 Wis. 284. See, also, *Philadelphia & Reading R. Co. v. Huber et al.*, 128 Pa. St. 63.

² *Richardson v. Great Eastern Ry. Co.*, 1 C. P. Div. 342.

³ *Flood v. Western Union Tel. Co.*, 131 N. Y. 603.

⁴ *Brann v. C., R. I. & P. R. Co.*, 53 Iowa, 595.

2645. Where a bridge on defendant's road fell by reason of imperfect construction of an abutment, not apparent upon ordinary observation, and it appeared the other abutment had developed defects of a similar character, and it was partially taken down and rebuilt, and it further appeared that the road, of which the bridge was a part, was built by defendant's predecessors, it was said that discovery of defects in one abutment would naturally lead a prudent man to doubt the safety of the other, and would impel him to make some effort to ascertain the trouble, beyond merely looking at the structure. Hence it was a question for the jury whether the defendant had performed its duty.¹

2646. The employer will be responsible for any injury resulting from defects in appliances which might have been discovered by him by the exercise of proper skill and care in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by him after a careful and skilful application of the ordinary and approved tests, then he cannot be held responsible, although it might appear that the defects might have been discovered by the manufacturer by applying the proper tests.²

2647. It was said: The application of the steam test for boilers being shown to be neither practicable nor generally approved on account of its danger, and the hydraulic test, as shown by the evidence, being extraordinary and rarely used except when engines are first put in use or fail to work well, or when they are overhauled periodically, the failure of the railroad company to have either or both of these tests applied to the defective boiler does not authorize the imputation of negligence.³

2648. It was said in reference to a locomotive boiler which exploded, that if the company omitted any test of soundness

¹ *Bogart v. D., L. & W. R. Co.*, 145 N. Y. 283.

³ *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

² *Nashville, etc. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

that ought to have been made, while in its shops for repairs, it was guilty of negligence. There was some evidence that the rivets should have been sounded by a hammer, which if done would have disclosed that they had been partially cut as the result of a former collision.¹

2648a. Where an engineer was injured by the explosion of a boiler, and there was evidence to the effect that there were fifty or sixty broken bolts, the ends of which were worn smooth; that the process of wearing them smooth takes considerable time; that a proper application of the hammer test will discover ninety per cent. of the broken bolts, and that such bolts generally break gradually, it was held that the court could not say as a matter of law that an inspection made by the application of the hammer test fourteen days prior to the accident was not negligently made.²

2649. If the servants to whom the employer delegates the duty of inspecting its appliances perform it so negligently as to permit a car to go into service on the train, one of the wheels of which has an old crack in it some twelve inches long, filled with grease and dirt, but which could have been detected without difficulty, and in consequence of that wheel giving way, while the train is in motion, an accident takes place by which another servant is injured, the company is liable.³

2650. Where the cause of an accident was a defect in a coupling-pin, and it was claimed, in the absence of proof, that the presumption was that the car had been properly inspected, it was said that this would not aid the contention of the defendant, because the jury had a right, from the facts before them, to reach the conclusion that if an inspection was made, it was not made with such care and prudence as would relieve the defendant from the charge of negligence.⁴

¹ St. Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 524.

³ Union Pacific R. Co. v. Daniels, 152 U. S. 684.

² Woods v. C. & G. T. R. Co. (Mich.), 66 N. W. 328.

⁴ Terre Haute & L. R. Co. v. Mansberger, 65 Fed. 196 (C. C. A.).

E. Duty Personal to the Master.

2651. In order to keep the machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections and examinations, and he cannot escape the responsibility by delegating this duty to one who, in other respects, may be a fellow-servant of the one injured.¹

2652. Proper inspection, for the purpose of discovering defects which may arise from use, is part of the duty a railroad company owes its employees. The adoption of a rule requiring inspection will not relieve the employer. The duty is personal, and the inspector stands in the place of the master.²

2653. Where a brakeman was injured by the giving way of a hand-hold upon a car it was said: "If such defect was one that could have been discovered by a careful inspection of the car by a competent inspector, and repaired, the company is liable, although the proximate cause of the injury was a result of the negligence of the inspector or master mechanic, respectively charged with the duty of inspecting and keeping such hand-hold in repair."

F. Contrary Rule.

2654. It is the duty of railroad companies to exercise ordinary care in the maintenance of the machinery and tools which they put into the hands of their employees, and to institute proper and reasonable regulations for the safety of their employees in this respect; but this rule must be taken in a practical sense. If, however, the company employ competent and skilful persons for the purpose of inspection and afford them reasonable opportunities and facilities for

¹ Van Dusen v. Letellier, 73 Mich. 492; Wedgwood v. C. & N. W. R. Co., 44 Wis. 44; Bowen v. C., B. & K. C. R. Co., 95 Mo. 268.

² Bailey v. R., W. & O. R. Co., 139 N. Y. 302.

³ Cooper v. P., C. & St. L. R. Co., 24 W. Va. 37.

See APPLIANCES, 241 et seq., 250 et seq.; FOREIGN CARS, 2536 et seq.;

FELLOW-SERVANT, in index.

the work, under proper instructions, the company ordinarily will not be liable for the negligent performance of the work by their employees to a fellow-employee, unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted. It is the duty of the company to provide suitable persons in sufficient numbers at proper places with reasonable opportunities to accomplish the work.¹

2655. Yet, in a subsequent case, it seems to be assumed as the law, and it is so expressed in the syllabus, that a railroad company owes to its employees the duty of exercising reasonable care in regularly inspecting cars, brakes and other appliances used by the latter, so as to ascertain if such appliances remain in suitable and safe condition, and to remedy any defects that may be discovered.

The facts were, to which this rule was applied, that there was injury to a brakeman using a brake which was so defective that a thorough inspection would have discovered it. It was assumed that the company was negligent either in not discovering it or permitting it to remain so.²

G. New Appliances and Defects in Construction.

2656. It was said with regard to the defect in the iron of a boiler which seemed to have been revealed by the explosion, it may be said it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces to see if there be some latent defect. If he purchases from some manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say it is never the duty of a purchaser to make tests or examination of his own, or that he can always wholly rely

¹ Philadelphia & Reading R. Co. v. Hughes, 119 Pa. St. 301.

² Philadelphia & Reading R. Co. v. Huber et al., 128 Pa. St. 63.

upon the assumption that the manufacturer has fully and sufficiently tested it. It may be, and doubtless often is, his duty, when placing the machine in actual use, to subject it to ordinary tests for determining its strength and efficiency.¹

2657. A purchaser of appliances has a right to assume that, when bought from a reputable dealer, they are in good condition, if they seem to be so on such reasonable inspection as is usual and practicable, and is not chargeable with negligence if defects do exist which are not discovered. Hence, where a railroad company purchased a car of a reputable manufacturer, an axle of which broke while in use, caused by a latent defect, not discoverable by any usual or practicable test, it was held that there was no neglect of duty, and consequently no liability on the part of the master.²

2658. Where a brakeman was injured by the breaking of a brake-chain, caused by an imperfection in its construction, it was held the company was liable to an employee injured thereby, upon the ground that the defect would have been discoverable upon proper test and inspection. It was said: They (the company) cannot be held responsible for latent defects in tools or appliances if they have used reasonable care in procuring them, but they are not absolved from the duty of testing or inspecting because they bought in the open market of reputable dealers or employed competent workmen to construct them. If any defect exists which a careful test or inspection would have discovered, the master must be held to have knowledge of such defect and to be responsible for it. His duty requires that he shall, before it is placed on a car, cause every link of every chain used by its employees in places or under circumstances involving danger in case the chain should break, to be carefully tested and inspected by some one competent to judge of its fitness for the utmost strain that is likely to come upon it.³

¹ *Richmond & D. R. Co. v. Elliot*,
149 U. S. 266.

³ *Morton v. Detroit, B. C. & A. R.*
Co., 81 Mich. 423.

² *Grand Rapids & I. R. Co. v.*
Huntley, 38 Mich. 537.

2659. Where a brakeman was injured by the breaking of a brake-chain, evidently from an imperfection in its construction, it was held the company was not liable so long as it appeared they had used ordinary care in inspecting it. It was said: "It is insisted the jury were justified in finding that proper care required that these chains should be detached at intervals and their strength tested by hydraulic pressure or dead weight, or by some other mode effectual for that purpose. It seems that such a requirement is unreasonable and unnecessary either to insure the safety of the public or employees." The chain had been used but a short time.¹

2660. Where a railroad company purchased a road of another company, of which an existing bridge formed a part, which bridge at the time of the purchase was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector, and could easily have been ascertained by proper examination, it was held it was negligence on the part of the corporation to continue its use without such an inspection and the correction of the defects that thus ought to have been disclosed; that it was liable to an employee upon one of its trains for injuries received by the fall of the bridge, and this though the bridge had been in use for several years before the purchase.²

2661. A bolt in a brake-beam projected in the way of a brakeman coupling cars. Evidently it was a fault in the construction. It was held a question for the jury whether it constituted a defect, and also whether it had existed so long or was of such a character that the defendant by the use of ordinary care could have discovered and remedied it. That negligence might be inferred without proof of actual notice of the defect.³

2662. The duty of the company was thus stated where injury to a passenger was involved: "They must provide and

¹ *De Graff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125.

³ *Wedgwood v. C. & N. W. R. Co.*, 44 Wis. 44.

² *Vosburgh v. L. S. & M. S. R. Co.*, 94 N. Y. 374.

use properly constructed machinery, well constructed by competent and skilled workmen, where manufactured by the company, and from good material. They must employ competent, skilful, prudent and sober men to use such machinery, and in doing so they must be careful and vigilant in its examination to see that it is in proper repair and in a safe condition. On the other hand, they cannot be held to answer for latent defects in materials employed in the construction of their machinery which the usual and well-recognized tests of science and art afford for the purpose, but fail to detect. . . . Where they have, so far as the employment of reasonable skill and experience enables them, employed experienced, skilful and experienced servants to use their machinery, have selected good and safe machinery so far as known and well-recognized tests can determine, constructed of proper material free from defects so far as like tests will disclose, neither reason nor justice requires that they should be held liable for injuries that may result from using their franchises."¹

2663. If a railway company purchases a locomotive from a firm of builders of recognized high standing and responsibility, its duty to those employed about such locomotive will be to see, by the use of ordinary tests for determining its strength and sufficiency, that it is reasonably safe and suited to the uses for which it was purchased; and such company is not obliged to dismantle complicated machinery for the purpose of inspection, nor to keep on hand such mechanical contrivances, nor to employ such expert labor, as are required for highest tests.²

2663a. Where an employer purchases articles required for use, such as eye-bolts, from a reputable manufacturer, and the eye-bolt has no visible defect and is selected and put in use by a fellow-servant of one injured by its parting, caused by improper welding, it was held that the master was not liable.³

¹ Illinois Central R. Co. v. Phillips, 49 Ill. 237.

² Clyde, etc. et al. v. Richmond & D. R. Co., 65 Fed. 482 (C. C. A.).

³ Doyle v. White, 35 N. Y. S. 760.

CHAPTER XIV.

INSTRUCTION AND WARNING.

- A. *Rule*, 2664 et seq.
- B. *Rule Extends Only to Work Employee Required to Perform*, 2670 et seq.
- C. *Rule Applies Where Changes are Made Increasing Hazard*, 2673.
- D. *Application of the Rule—Incidents*, 2674.
- E. *Duty Not Imposed Where Master is Not Chargeable with Knowledge of the Danger*, 2700 et seq.
- F. *Rule Not Applied to Dangers Resulting from the Negligence of Fellow-servants*, 2706 et seq.
- G. *Rule Does Not Apply Unless the Master Ought to Have Known of the Incapacity or Inexperience of Servant*, 2707 et seq.
- H. *Where a Servant Seeks Employment, Ordinarily the Master May Assume that he is Competent and that he Appreciates the Danger*, 2718 et seq.
- I. *Known or Obvious Dangers—Application of the Rule*, 2729 et seq.
- J. *Minors—Application of the Rule*, 2758 et seq.
 - 1. *Capacity to Appreciate the Dangers*, 2766 et seq.
 - 2. *Twelve Years Old*, 2778 et seq.
 - 3. *Thirteen Years Old*, 2784 et seq.
 - 4. *Fourteen Years Old*, 2794 et seq.
 - 5. *Fifteen Years Old*, 2807 et seq.
 - 6. *Sixteen Years Old*, 2810 et seq.
 - 7. *Seventeen Years Old*, 2819 et seq.
 - 8. *Eighteen Years Old*, 2829 et seq.
 - 9. *Nineteen Years Old*, 2838 et seq.
 - 10. *Twenty Years Old*, 2848.
 - 11. *Obvious Dangers*, 2849 et seq.
- K. *Character and Extent of the Warning and Instruction to be Given*, 2861 et seq.
- L. *Peculiar and Special Perils*, 2875 et seq.

A. *Rule.*

2664. One of the recognized duties of a master is not to expose an inexperienced servant at whose hands he requires a dangerous service to such danger without giving him warning. He must also give him such instruction as will

enable him to avoid injury, unless both the danger and the means of avoiding it while he is performing the service required are apparent. These are obligations of the master, and he cannot exempt himself from liability by delegating his power to command the servant to another, upon whom the obligation to instruct and caution is also imposed.¹

2665. It is the duty of an employer to inform an inexperienced servant of dangers ordinarily incident to the service, and if he fails therein and the employee has no opportunity to learn of them, the latter will not be held to assume risks not obvious to one of his age, experience and judgment. This was said where a young man eighteen years old, six feet tall and weighing one hundred and eighty pounds, was killed while at work logging, by a log rolling upon him, and it appeared the work he was doing was attended by danger not obvious to one unaccustomed to the work, and that deceased had no experience and was not warned of the danger.²

2666. The law implies that where there are special risks in an employment of which the servant is not cognizant or which are not patent in the work, it is the duty of the master to notify him of such risks. On failure of such notice, if the servant himself, being in the exercise of due care, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew or ought to have known of such risks.

It is unquestionably the duty of the master to communicate a danger of which he has knowledge and the servant has not. But there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant who is capable of contracting for himself and knows the danger attending the business in the manner in which it is conducted. It is his duty to use ordinary care to protect himself. He is under as great an obligation to provide

¹ *Atlas Engine Works v. Randall*, 100 Ind. 293; *Pittsburg, C. & St. L. Company, 90 Wis. 178, 63 N. W. 87. R. Co. v. Adams*, 105 Ind. 151. ² *Wolski v. Knapp, Stout & Co.*

for his own safety from such dangers as are known to him or discoverable by the exercise of ordinary care on his part as the master is to provide for him. It is his duty to go about his work with his eyes open. He cannot wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must inform himself. This is the law everywhere.

The facts were that a machinist in the shops was directed by the foreman to shackle cars in the yard, and in so doing he was injured by being caught between the bumpers. It was held that the dangers were so apparent that from his experience he did not require instruction.¹

2667. An employee has a right to suppose that his employer has provided such safeguards and means of protection from injury in the use of machinery, tools and appliances usual and reasonably necessary for his safety, and he cannot be held to assume the risks attendant upon their absence unless such absence is apparent or his attention has been called to it. If the business is one with which he is not familiar, he has a right to expect that its dangers will be pointed out to him and that he will be instructed in those things necessary for him to know in order to his own safety. He cannot be held to assume the risks of dangers of the existence of which he has no knowledge. In the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. The duty in such case to warn and instruct grows naturally out of the ignorance or inexperience of the employee, and it does not extend to those who are of mature years and familiar with the employment and its risks.

This was said in reference to a youth of seventeen years who was injured in the attempt to open a device called a gate in an iron mill, which required some degree of strength

¹ *Wormell v. Maine Cent. Ry. Co.*, 79 Me. 397.

and experience, where he was exposed to injury from revolving cogs, and where it appeared he had been at work but a short time. It was held that it was a question for the jury whether he had been sufficiently warned and instructed as to the dangers and how to avoid them. It was further said that it was meant by a statement upon a former appeal (111 Pa. St. 343) that a workman must know the dangers of his employment by actual experience in the employment or by the instructions of his employer before he can be held to have assumed them.¹

2668. It was stated that it is the duty of the master who sets a servant at work in a place of danger to give him such notice and instruction as is reasonably required by the youth or inexperience or want of capacity of the servant. This duty is not confined to cases where the servant is a man of manifest imbecility.²

2669. It is the duty of the master to know what appliances are suitable and in common and ordinary use for the purpose. The employee has a right to assume that the master will perform his duty. If the work is new to the servant, he should be instructed in it, and if he is not acquainted with the latent dangers incident to it they should be explained to him. In such case he is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use, and he is not chargeable with an assumption of the risks involved in the failure to provide them.³

B. Rule Extends Only to Work Employee Required to Perform.

2670. The duty of instruction does not extend to work which the employee is not expected to do. So held where a boy undertook to perform work with a machine in a place in which he was not expected to work.⁴

¹ Rummell v. Dilworth, 131 Pa. St. 509.

² Atkins v. Merrick Thread Co., 142 Mass. 431.

³ Bannon v. Lutz, 158 Pa. St. 166.

⁴ Leistriz v. American Zylonite Co., 154 Mass. 381; White v. Wittemann Lithographic Co., 131 N. Y. 631.

2671. Where a master does not require his servant to repair machinery used by the latter, but has a machinist employed to perform that duty, to whom the servant is required to report in case of the machinery becoming out of order, it is not required that he instruct the servant as to the manner of repairing, or the danger in attempting it, and in case the servant does attempt it without orders, and is injured, the master is not liable.¹

2672. Where an employee with experience with machinery, set at work on the morning of the accident to assist a workman upon a machine, voluntarily, during the temporary absence of such workman, attempted to perform his work and was injured, it was held that he could not be heard to claim that the master was negligent in not warning and instructing him concerning the danger.²

C. Rule Applies Where Changes are Made Increasing Hazard.

2673. Where there has been any change made in the appliances after a servant has commenced his employment which increases the hazards of the service, it becomes the master's duty to instruct or warn the servant as to such increased danger.³

D. Application of the Rule — Incidents.

2674. Approach of crane on its track in mill.—Where an employee was ordered into a place of danger outside his regular duties, and while performing the same rested his arm across an elevated track upon which a large crane moved, and such crane was stationary when he commenced his duty, but started when he was performing it, the customary signal being given, which was not heard by such employee owing to the great noise in the shop and his at-

¹ McCue v. N. S. Mfg. Co., 142 N. Y. 106.

³ Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285.

² Richstain v. Washington Mills Co., 157 Mass. 538.

tention being engrossed with his duties, and his arm was crushed, the rule was applied that the servant has a right to rely upon the fact, where engrossing duties are required of him, that the master will not without proper warning subject him to other perils unknown to him and from which the work exacted necessarily detracts his attention.¹

2675. Approach of trains.—Where a track-master of a railway company employed an inexperienced person with his train to scrape snow from the tracks on a very stormy day, and as an inducement promised to advise him of the approach of trains, and such person was injured by being struck by a train, of the approach of which he had not been warned by such foreman, it was held that the neglect of such foreman would be imputed to the company, and it was liable.²

2676. Where the plaintiff in the employ of a contractor of defendant, engaged with defendant's knowledge in grading for a new railroad track alongside and parallel to defendant's main track, was injured by some portion of the sides of the cars in a train running on such main track striking him as he was making an effort to get out of its way, and it appeared that it had been the uniform practice of those operating trains to give such workmen warning of the approach of trains by signals, which in this particular instance was omitted, it was held that the defendant owed the workmen the duty of active vigilance in giving them proper signals of the approach of trains, and that they had under the circumstances the right to rely upon the continued performance of this duty, without the necessity, while engrossed in their work, of themselves keeping a constant lookout for approaching trains. The duty of the defendant would be the same whether the workmen were in its employment or in that of its contractor. It would not ordinarily be the duty of those operating a train to stop it or slacken its speed provided they gave the proper signals. They would have a

¹Michael v. Roanoke Machine Works, 92 Va. 492, 10 S. E. 261.

²Bradley v. N. Y. C. R. Co., 62 N. Y. 99.

right to presume that the workmen would heed the warning and move from the place of danger. But if the trainmen saw they did not hear the signals and were making no effort to escape, it would then be their duty to stop the train if there was still time to do so before injuring them.¹

2677. It was said that negligence could not be predicated upon the failure of a section-boss to give employees under him warning of the approach of trains. It would be most unreasonable to require the master to keep a special watch over every employee and warn him of every common danger to which he might be subjected in the performance of his ordinary duties, and the law does not require it.²

2677a. Where a section-foreman directed a section-hand to shovel cinders from the track on a windy day, and while the latter was so engaged he was run down by an approaching train, it was held that it was a question for the jury whether such foreman was negligent in directing the plaintiff to work on the track when a train was nearly due without keeping watch and warning him of the approach of the train, as well as whether the engineer of the train was negligent in failing to give such trackman signals of warning until the engine was nearly upon him.³

2678. Where the deceased had been engaged for a long time in wheeling rock from one side of the railway track to the other on planks laid over the track, and it appeared that on the day of the accident the regular train was a few minutes late and running very fast, and on hearing the signal from the engine, then being near if not upon the track, he attempted to remove the planks and prevent a wreck, and that it had been the custom to give warning signals of the approach of trains at this place, its necessity being known, it was held that the evidence warranted a recovery. (I assume that the signal was not given in time; the question of wilful neglect was involved.)⁴

¹ *Erickson v. St. Paul & D. R. Co.*,
41 Minn. 500, 43 N. W. 332.

² *Ring v. Missouri Pacific R. Co.*,
112 Mo. 220.

³ *Comstock v. Union Pacific R.
Co.*, 56 Kan. 228, 42 Pac. 724.

⁴ *Cincinnati, N. O. & T. P. R. Co.
v. Barber* (Ky.), 31 S. W. 482.

2679. Where an employee was injured while engaged in painting stationary cars standing on a switch in a shed, by an engine backing around a curve into the shed to couple on cars standing ahead of the one upon which plaintiff was at work, pushing them against it, it was held that it was the defendant's duty to warn him of the approach of the engine, and if warning was attempted by means of persons calling out to him, it should have been so distinct and loud that it might have been heard by a person of ordinary hearing in plaintiff's locality.¹

2679a. Where a station agent went upon a track signaling an approaching train which was backing down, and was injured, as was alleged, by the negligence of the men in charge of the train, and it was shown from the testimony to have been the duty of those operating the train to have had a brakeman on its rear, who might give warning of its approach, it was said that it was no excuse to say that the company was using, instead of the usual cabooses, a box-car which did not conveniently admit of those customary precautions. The principle was applied that when a workman's presence on the track was known to those operating an approaching train, and due care was not exercised in giving warning in time for the workman to save himself and prevent a wreck, the master is liable.²

2680. Absence of jaw-strap on car.— Where a brakeman was ordered to separate coal cars from box-cars, and in performing the act to ride upon the cars, and was injured while attempting to get on the car by reason of a jaw-strap being missing, it was held that the question of defendant's negligence was proper for the jury, upon the ground that the defendant, knowing the condition of the car, put a conductor there with men under him without warning him or them of the defect, while having reasonable grounds to anticipate that such orders would be given by the conductor as were given. It was said, however, that it was necessary to show

¹ Mississippi Cotton Oil Co. v. Ellis, 72 Miss. 191, 17 So. 214.

² Illinois Central R. Co. v. Mahan (Ky.), 34 S. W. 16.

that the plaintiff was actually ordered into the dangerous place.¹

2680a. Brake, limber staff.—Where a brakeman was injured by being thrown from a car while letting loose a brake, and it was alleged that the cause was that the brake had a limber staff which was more dangerous than one with a stiff staff, in that it required greater effort to loosen it, and when loosened might jerk or throw the employee, and it appeared that the brakeman had an experience of about two months, and the claim was that he should have been warned of the dangers and instructed in the use of such brake, it was held that the question was proper for the jury.²

2681. Crevice in earth bank.—Where an employee was injured by the fall of a bank of earth while working at the bottom of a steep shaft, and he did not know there was a crack in the side of the shaft indicating that the earth was liable to fall, and the defendant knew of the existence of such fissure and failed to inform him, it was held that he should have been informed, and therefore did not assume the risk.³

2682. Where the danger to laborers engaged in loading cars in a gravel pit is greatly increased at times by the caving off of an embankment by other laborers, and the foreman at such times had always given warning of such danger, it was held that an instruction to the effect that the laborers were entitled to such warning and were not required to keep as constant a watch as they otherwise would be required to do, stated the law. The foreman was held not a fellow-servant.⁴

2683. Crevice in wall of building being torn down.—Where the owner of a building, superintending the work of tearing it down, knew of dangers incident to the work, such as the existence of a crack which might cause the wall to fall, he was held to the duty of warning and instructing an

¹ *Coates v. Boston & Maine R. Co.*, 153 Mass. 297.

² *Louisville & N. C. Co. v. Binion* (Ala.), 18 So. 75.

³ *Strahlendorf v. Rosenthal*, 30 Wis. 674.

⁴ *Andreson v. Ogden, U. R. & D. Co.*, 8 Utah, 125, 30 Pac. 305.

employee engaged in the work of the dangers to be apprehended therefrom.¹

2684. Crevice in a mine.—It was held that a servant working in a mine where he was exposed to dangers from falling rock, threatened by a crevice which was known to the superintendent and unknown to such employee, did not assume such risk; that the master's duty was to take precautions to obviate the hazards and to warn employees thereof.²

2685. Crevice in quarry.—Where a servant was placed at work loading rock from a cliff, and the defendant's road-master knew the cliff was dangerous, owing to a seam or crack therein, visible only from the rear of the cliff, and he failed to warn the servant of the danger, and it was unknown to the servant, it was held that the defendant was liable.³

2685a. Engine frame, moving of; work requiring skill. Where an unskilled apprentice is directed to do work that requires a skilled mechanic to perform, and is directed to call to his assistance other employees also ignorant of said work, and such work is dangerous, and such danger is known to the foreman and is unknown to such employees, and no notice is given to them of the danger, and he failed to give them instructions which, if given and followed, would have prevented the accident, and one is injured while at said work, the employer is liable.

This was said where an apprentice seventeen years old in a machine shop was directed by the foreman in charge to obey the call and direction of another employee, also an apprentice, engaged in drilling an engine frame, which work required a skilled mechanic to safely handle, and the latter removed the clamp that was provided to hold the frame from falling and attempted to remove the frame, directing

¹ Ryan v. Tarbox, 135 Mass. 207.

³ Ellege v. National City & Otay

² Pantzar v. Tilly Foster Iron R. Co., 100 Cal. 282.

Mining Co., 99 N. Y. 368.

the former to remove the trestle under the frame, when it fell, killing him.¹

2685b. It was held to be the duty of the master to inform an employee about to engage in work, of the existence of a ditch of hot water, where he was being shown by another employee his place of work, and it became necessary to cross such ditch, which was unguarded, upon a plank at a place where it was dark.²

2686. Goose-neck coupling, use of.—It was held where a wiper about a round-house was injured while coupling cars with what is termed a stiff goose-neck, which the court assumed was not a reasonably safe appliance, and it appeared he had never seen a coupling where it was used, and had not been instructed as to its danger, that the company should have informed him of the dangers and the means of securing safety.³

2687. It was held that an experienced brakeman, who was injured while coupling a passenger engine to cars, as was claimed, by reason of the use of a goose-neck coupling, whose evidence was to the effect that he had always worked on freight trains where such couplings were not used, and did not have any knowledge of the use of such appliance or of its dangerous character, which was disputed, should have been warned of the character of the appliance, and notified of its use, where the jury solved the conflict of the evidence in his favor.⁴

2688. Guarding car-repairer.—Where the foreman in the repair department of a railroad company promised a car-repairer before the latter went under a car to watch and see that he was not injured, and also asked two other employées also to watch, and he stated he relied on the promise of all to protect him, and it appeared that the foreman abandoned the watch for a short time, when the car-repairer

¹ Missouri Pac. R. Co. v. Peregoy, 36 Kan. 424, 14 Pac. 7.

² Powers v. Calcasien Sugar Co., 48 La. Ann. 483, 19 So. 455.

³ Grannis v. C., St. P. & K. C. Ry. Co., 81 Iowa, 444.

⁴ Galveston, H. & S. A. R. Co. v. Garrett, 73 Tex. 262, 13 S. W. 62.

was injured by a car being moved against the one under which he was at work, it was held that the company was liable; that the promise of such foreman was that of the company; and though he may have known that the foreman had abandoned the watch, yet he was justified in relying upon him to take other adequate means of protection.¹

2689. Guarding employee working upon ice-chute.—

Where the cause of injury to an employee at work in connection with the harvesting and storing of ice was determined to be the neglect of the superintendent in charge to notify the engineer that he was in a dangerous place at the run, where he was engaged in removing an obstacle therein, and the engineer, upon a signal accidentally given, presumably from something striking the bell-cord, started the engine, resulting in carrying the employee along the slide, it was held the defendant was liable; that under the rules it was his duty to notify the engineer, and to remain at the foot of the slide to warn the employee of danger.²

2690. Horse, vicious habits of.— Where the driver of a street-car was injured from the kick of one of the team he was driving, and it appeared that such horse was a broncho, that his propensity to kick when struck with the lines was known to the master but unknown to the driver, the latter never having driven him before, it was said that it was the duty of the defendant to furnish the driver with a safe team or inform him of its vicious habits so he could guard against them. It was held that there was sufficient evidence to authorize the question of defendant's negligence to be submitted to the jury, and judgment of nonsuit was reversed.³

2691. Lime kiln, method of work.— It was held that an inexperienced employee engaged in working upon a lime kiln, where the duties of employees were, as the burned stone below was taken out, that they should stand upon the

¹ Missouri Pac. R. Co. v. Williams,
75 Tex. 4, 12 S. W. 835.

³ Leigh v. Omaha St. Ry. Co., 36
Neb. 131, 54 N. W. 134.

² Gerrish v. New Haven Ice Co.,
63 Conn. 9, 27 Atl. 235.

mass above and force it down, and as it commenced to settle to quickly step off, was entitled to instruction as to the work, and warning of the dangers incident to its performance; and where such an employee, while so engaged, failed to step off in time and was carried down with the mass of unburned stone and killed, the master was held liable.¹

2692. Lumber coming down chute.— Where a laborer in the employ of one who had the contract with the operators of a saw-mill to remove from the mill and pile in the yard all lumber as fast as sawed was injured by lumber coming down upon a platform, where he was at work, upon him, and such operators had adopted and practiced the custom of warning the men of the coming of such lumber by means of a signal given by a man or boy at the head of the slide, and it appeared that in this particular instance such warning was omitted, it was held that such omission to give the customary signal was negligence on the part of such operator, and that it was not negligence for such workman to wholly rely upon its being given. It was said the duty in the abstract of such operator to give warning by signal of the coming of the timber through the slide is not involved. It had selected this method of notifying the men at work upon the platform of the coming danger; it had adopted and practiced the custom of giving the warning, and the injured laborer had every reason to suppose such custom would be continued.²

2693. Where an inexperienced employee in a mill was injured while working at the foot of a slide by a large stick of timber coming down the slide, striking a stick and forcing it against him, and it appeared that occasionally warning was given by other employees of the descent of sticks of timber down the slide, but that there was no regularity in doing it, nor person selected for or directed to perform this duty, and no warning was given in this instance, it was held that the defendant was negligent in not

¹ Parkhurst v. Johnson, 50 Mich. 70.

² Anderson v. Northern Mill Co., 42 Minn. 424, 44 N. W. 315.

adopting rules or regulations whereby notice or warning could be given to employees in order that they might guard themselves against the danger.¹

2694. Machine, cleaning of.—Where an inexperienced employee was set at work upon dangerous revolving machinery used in refining sugar, and was told how to start the machine and how to take the sugar out, but was given no other instructions, and it appeared that he refused to do the work at the request of his immediate foreman, but did consent at the request of the foreman of the warehouse, and it further appeared that while cleaning the machine, after the day's work was over, his arm was caught in it, causing him injury, and that he knew how to start and stop the machine, and that it was not required that he should clean it while in motion, it was held that there was evidence to show that he was placed in a position of peculiar danger, of which he had no knowledge or experience, without being informed of the risks or instructed how to avoid them.²

2695. Mine, loose stones in shaft.—It was held the duty of the superintendent of a mine, who knew that stones had been continually falling from the slope of a mine at a certain place which rendered such place more dangerous than other parts, to notify a servant put at work in such place of such danger.³

2696. Pole, removal of support.—Where an employee was killed by the falling of a pole which was being lowered, and its support had been a pile of coal around its base, and he was working near without knowledge of the danger from the manner in which the work was being done, that is, the removal of the coal from its base, and the employer failed to advise him, it was held that the master was liable, upon the ground that his duty was to provide his workmen with a reasonably safe place to work, and to warn them of dangers of which they were ignorant.⁴

¹Hartvig v. Northern Pacific Lumber Co., 19 Oreg. 522, 25 Pac. 358.

²O'Connor v. Adams, 120 Mass. 427.

³Deweese v. Meramec Iron Min. Co., 128 Mo. 423, 31 S. W. 110.

⁴Trainor v. Philadelphia & R. R. Co., 137 Pa. St. 148.

2697. Shaft near place of work.— Where a laborer was called upon to assist in raising heavy timbers to the second floor of a building, and he had to stand upon a bar of iron and brace himself against the wall of the building to perform it, and was injured by his clothing getting caught in a shaft close to him of which he was ignorant, it was held that he should have been warned of the danger connected with the performance of his duties by reason of the proximity of such shaft.¹

2698. Track, cinders at the side of.— Where a brakeman was injured in the night-time while in the act of jumping from a slowly-moving train to adjust a switch, which was the usual method of performing this duty, and there had been dumped on the sides of the track since he had performed the same duty, which was the morning of the day he was injured, a car-load of cinders, which lay in heaps, and he alighted upon one such, lost his footing and fell under the train, it was held that it was the duty of the defendant to have notified him of such increased danger, and it was liable for its omission so to do.²

2698a. Trench.— It was held the duty of the master who was constructing a trench or ditch, where one of the employees was put at work by the foreman in an unusually dangerous place, to give him proper warning and instruction, and the act of the foreman in so directing the servant and his omission to give instruction were chargeable to the master.³

2699. Well near place of work.— Where a person was employed to make repairs on a steam-engine located in the employer's cellar, and close to the place where he was required to work there was a well-hole filled with hot water, of which danger the employee did not have notice, and he was injured by stepping into it, it was held that an instruc-

¹ Pullman Palace Car Co. v. Harkins, 55 Fed. 932.

³ Carlson v. North Western Tel. Exch. Co. (Minn.), 65 N. W. 914.

² Kansas City, Ft. S. & G. R. Co. v. Kier, 41 Kan. 661, 21 Pac. 770.

tion to the effect that it was the defendant's duty, under the circumstances, to give the plaintiff proper warning of the danger from such source or to guard the well, was proper.¹

2699a. It was held, upon demurrer, to be the duty of an agricultural society that hired a girl to ride on a track-race to notify and warn her of the habit of a horse other than the one she was engaged to ride to bolt the track, where it was alleged she was injured by such horse so bolting, that the officers of the defendant knew of such habit and failed to warn her, and that she was ignorant thereof.²

E. Duty Not Imposed Where Master is Not Chargeable with Knowledge of the Danger.

2700. The rule only applies where there is a danger known or which ought to be known to the employer of which the employee, through youth or inexperience, is ignorant, and which the employee cannot reasonably be expected to discover by the exercise of ordinary care. This was said where an employee was injured by a set-screw upon a revolving shaft,—while he did not know of the set-screw, he did know of the danger from the shaft and pulleys.³

2701. To charge the master the danger should be such as to suggest itself to a man of ordinary prudence. Hence it was held, where a plank used to make an easy ride over a sill had become so worn as to leave a jolt of half an inch over which the wheels of a truck had to pass, that it could not be said there was negligence in leaving such a slight obstruction to the truck wheels unremedied.⁴

2702. The duty of an employer to give instructions to one about to work on dangerous machinery exists only when there are dangers in the employment of which he has or ought to have knowledge, and which he has reason to believe

¹ *Homer v. Everett*, 91 N. Y. 641.

³ *Rooney v. Sewall, etc. Cordage*

² *Lane v. Minnesota State Agl. Soc. (Minn.)*, 64 N. W. 382.

Co., 161 Mass. 153.

⁴ *Nelson v. Allen Paper Car Wheel Co.*, 29 Fed. 840.

his employee does not know and will not discover in time to protect himself from injury.¹

2703. A young man nineteen years of age was ordered by the foreman to wipe off a machine having revolving cogs while in motion. He was practically inexperienced in the use of machinery. While so engaged, and by reason of the manner in which he held the waste in his hands, not holding it compactly, a portion of it was caught in the wheels and his hand was drawn in and injured. The claim was that the foreman should have instructed him and warned him of the danger.

It was said, as applicable to the facts and circumstances developed in this case, that two things were material:

First. That the danger to which the servant was exposed, and which was the proximate cause of the injury, was one which was known or might reasonably have been apprehended by the master.

Second. That such danger was one which, by the exercise of the faculties of the servant when directed to the thing he was commanded to do, was not open to his observation and apprehension, assuming he was giving care and attention to the work required of him.

It was held that the foreman could not reasonably have anticipated that the plaintiff would use the waste in the manner he did; that ordinary, usual and probable consequences he was bound to anticipate, but he was not bound to anticipate extraordinary, unusual and improbable occurrences, which involved inattention on the part of the servant. As to the other requisite, it was clear that if the servant had paid proper attention the injury would not have occurred.²

2704. It is not enough to entitle a plaintiff to recover to show that his injury was in fact the natural consequence of the act or omission of the defendant, but it must appear that under all the circumstances it might reasonably have been

¹ *Stuart v. West End St. R. Co.*,
163 Mass. 391, 40 N. E. 180.

² *Atlas Engine Works v. Randall*,
100 Ind. 293.

expected that such an injury would result. A mere failure to ward against a result which could not reasonably have been expected is not negligence.

This was said in reference to an injury occasioned by the sinking of a railroad track.¹

2705. Where an employee twenty-eight years old, while working with a machine run by steam power, was injured by his hand getting caught in the machine, the danger being obvious, and it appeared he had fifteen months' experience in operating a machine run by hand, and that the velocity was not materially increased by the use of steam, it was held that a verdict should have been directed for the defendant. That there was no reason on the part of the defendant to suppose that he needed either admonition or instruction as to the danger or the method of doing the work, and there was no claim in the evidence that any particular or special instruction was either necessary or usual.²

2705a. A helper to a mason laying pipe in a trench was injured by a boy (who was voluntarily assisting persons in charge of a street car in pushing a car upon tracks located near or over the trench) falling from the track upon him. The negligence suggested was failure to station a watchman there to prevent volunteers from helping to push cars over the trench. It was held that the injury to the plaintiff resulted from a pure accident, and that the omission to guard against it was not negligence on the part of the defendant.³

F. Rule Not Applied to Dangers Resulting from Negligence of Fellow-servants.

2706. Ordinarily the master is not called upon to instruct a young or inexperienced person in regard to dangers which can only result from the negligence of fellow-servants. It is not presumed that others will neglect their duties, and a

¹ McGowan v. C. & N. W. R. Co.,
91 Wis. 147, 64 N. W. 89.

² Dougherty v. West Superior L.
& S. Co., 88 Wis. 343.

³ Craven v. Mayers, 165 Mass. 271.

boy cannot expect to be instructed as to what to do in a situation which is not expected in the ordinary course of the business and which can only exist through the fault of another. If it be assumed that there are cases where peculiar dangers are so great and so obvious to the employer that he ought to give an inexperienced boy warning of them, he is called upon to do so only when he himself ought reasonably to anticipate them, and when his instruction would be likely materially to diminish the danger to his employee.

The facts were that a boy fourteen years old, while in an iron tank arranging cloth to be bleached, was burned by a fellow-servant pouring into the tank a hot solution of caustic soda, which should not have been introduced until the boy had left the tank.

It was further said, in reference to the facts in the present case, there is no evidence to sustain a finding that he owed the plaintiff any such duty. The danger of such an injury was very remote and improbable. It could only come from negligence which the employer had no reason to expect. Moreover, nothing which the plaintiff could have done could have relieved him from the possibility of such an accident.¹

2706a. Where an employee engaged with others in loading timbers from a wharf into a vessel was injured by a piece of timber passing down the chute prepared to carry it, and it appeared that a competent person was employed to give warning to the men in the hold of the vessel when a piece of timber was placed in the chute, who customarily gave warning, but omitted so to warn on the occasion in question, it was held that the master's duty in respect to furnishing his employees a safe place to work did not extend beyond the employment of a competent person to give the necessary warning. It did not include the actual giving of the warning in each particular place.²

¹ *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969.

² *Hermann v. Fort Blakely Mill Co.*, 71 Fed. 853.

2706b. Where an employee was sent to a round-house by the foreman to make repairs upon an engine therein, and while engaged in such work was injured by the blowing down of the engine by the engineer, and it appeared that the engineer knew that some one would be sent, though he had no notice that plaintiff would be sent, and it further appearing that such repairer was familiar with the work and its dangers, it was held that the foreman was not negligent in failing to give notice to the engineer that the plaintiff was sent to make the repairs or to the repairer of the dangers incident to the work.¹

G. Rule Does Not Apply Unless Master Ought to Have Known of the Incapacity or Inexperience of the Servant.

2707. In order that the master may be properly charged as negligent upon the ground of failure to warn and instruct his servant as to the dangers connected with his employment, and made liable for resulting injury, it must be made to appear that he knew, or by the exercise of reasonable care and observation might have known, of the inexperience and disqualification and immature judgment of the servant employed.²

2708. In the absence of evidence that the master knew of the inexperience of an employee and his ignorance of the dangers connected with the use of a machine which he was employed to operate, a jury cannot be permitted, in deciding the question, to rely upon mere inference, conjecture, or their own personal experience.³

2708a. The mere fact that an employee is injured because he was inexperienced and ignorant of the danger and hazard is insufficient to charge the master with liability for injuries received, on the ground of failure to instruct and warn.

¹ *Perry v. Old Colony R. Co.*, 164 Mass. 296.

³ *Sherman v. Menomonie Lumber Co.*, 77 Wis. 14.

² *Pittsburg, C. & St. L. R. Co. v. Adams*, 105 Ind. 151.

It must further appear, and if there is a special verdict the issue must be found, that the master, well knowing the plaintiff to be without skill and knowledge of the work, and well knowing its dangerous character, failed to so inform the employee; for unless the master knows, or ought to know, of some occasion for information or instruction, a neglect to impart any could not be regarded as the proximate cause of the injury.¹

2709. Brakeman pretending to be experienced.—It was held that a brakeman who, in order to get employment as such, pretended an experience which he did not have, could not maintain an action against his employer for injury received while performing the duties of a brakeman in an improper and careless manner.²

2710. Car-repairer.—One who seeks and accepts employment usually assumes all the risks incident to it, and generally it is not the duty of the employer to instruct him in the rules applicable to the service unless information be asked, or the employee is known to be ignorant and inexperienced regarding dangers peculiar to the service, for in accepting the employment he assumes to understand the service and to be in every way competent to discharge the duty. This was said where a car-repairer was injured while repairing cars on the track.³

2711. Upon a second appeal the court stated that the employer knew that the employee was ignorant of the dangerous character of the service when he sought the employment, and said that, to impose upon the servant the duty of inquiry about an unseen and unsuspected danger in order to entitle him to information possessed by the master and known by him to be needed by the servant, is a restriction upon the rule not warranted by reason or supported by authority.⁴

¹Klochinski v. Shores Lumber Co. (Wis.), 67 N. W. 934. 63 Tex. 549; Watson v. H. & T. C. R. Co., 58 Tex. 434.

²Stanley v. C. & W. M. R. Co., 101 Mich. 202, 59 N. W. 393.

⁴Missouri P. R. Co. v. Watts, 64 Tex. 568.

³Missouri P. R. Co. et al. v. Watts,

2712. Employee operating machine without objection.

An employee of mature years who is removed from one line of employment and set at work in another without objection, and is then injured while operating machinery with which he was unfamiliar, or which he did not know how to operate, cannot recover from his employer for such injuries, unless his employer knew that he did not know how to operate the machine, or, having informed his employer of his inexperience, he fails to instruct him. If a servant is ignorant of the method of operating machinery with which he is to work, it is his duty to inform his employer, and if he conceals his inexperience and undertakes to work with machinery with the operation of which he is unfamiliar, and is injured by reason of his inexperience, the employer is not answerable therefor.

When a person undertakes to engage in a master's service and to perform certain duties, the master has a right to assume that he is qualified to perform the duties of the position which he seeks to occupy, and competent to apprehend and avoid all the apparent and obvious hazards of such service; and the same presumption arises when a servant, employed to perform labor in one particular branch or department of a factory, is transferred by the master to another branch or department, and assigned to perform other and different work from that for which he was originally employed. It must be presumed that a servant will not undertake to perform labor or operate machinery concerning which he has no knowledge or experience. Hence, his willingness to undertake the work is sufficient to warrant the master in assuming that he is competent, unless it is shown that the master knows to the contrary.

The facts are unimportant, as the case was decided upon the question of defects in the appliance.¹

2713. Miner pretending skill.—Where an employee represents and undertakes that he possesses the knowledge and skill requisite to operate or use machinery or implements of

¹ *Arcade File Works v. Juteau* (Ind. App.), 40 N. E. 818.

a dangerous character, and which, if not properly used, are liable to cause injury, he, and not the employer, is responsible for consequences resulting to himself from his unskilful or negligent handling of it. This rule was applied to one employed to blast rock, and who was injured by stirring the material used for blasting in the cap.¹

2714. Minors.—Whether an infant is to be treated as having assumed a risk, and held to exercise ordinary care and caution, in order to recover damages from his employer in a case of personal injury, is always an open question, depending upon his capacity and fitness for the particular kind of labor he may be employed at when so injured; and therefore the jury should be instructed in every case to find for the plaintiff, unless his age, intelligence and experience were such as to induce a man of ordinary care and prudence to believe him qualified and fitted for the labor at which he employed him.²

2715. It was said in reference to a lad seventeen years old that there was evidence from which a jury could infer that the master knew the machine which injured him was dangerous to an inexperienced person, and that the danger was not sufficiently obvious to be apparent to such a person without proper explanation and warning. (What was the kind or character of the machine is not disclosed.) That the plaintiff was not a child, but was seventeen years of age, would not deprive him of the right to be warned, if as a question of fact the employers or the man representing them ought, under all the circumstances, to have inquired of him as to his experience, or taken notice of the probability that he was so inexperienced as to render it proper to give him warning.³

2716. Where a boy sixteen years old, of average size and apparent strength, had been employed as a shifter to a moulder in a foundry for some months, and it appeared, how-

¹ Ray v. Jeffries, 86 Ky. 367.

³ May et al. v. Smith, 92 Ga. 95,

² De Lozier v. Kentucky Lumber Co. (Ky.), 18 S. W. 451.

ever, that his arm had been broken, which fact was unknown to his immediate superior, and that on the morning of the accident he told such superior he was not strong enough to do the work, though his arm was in its customary condition and he was feeling as strong as usual, and in the manner of doing his work some of the metal was not removed as it should have been done, and as a result, the moulder in performing his duties fell over on such piece and was severely injured by the hot metal, which injuries, it was claimed, were due to the incompetency of such boy, it was held that such superior had the right to assume that he was dealing with a boy of average strength, and that notwithstanding the boy's statement he was justified in instructing him to go to work.

It was said that where the work to be done requires only sufficient strength and a moderate degree of intelligence, the employer must, in selecting servants, exercise only that reasonable care which an ordinarily careful man exercises under such circumstances, and not such care as will reduce the danger of accident to a minimum.¹

2717. Section-hand.—Where a servant has actually operated and seen others operate an implement or machine often enough to enable him by the exercise of ordinary intelligence and care to learn how to avoid being injured by it, or where the mode of operating it is so simple that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting upon the master to instruct him.

This rule was applied to a section-hand who had only worked on a railroad for a week, and who was injured by being struck by the lever while he was in a stooping position throwing aside a hammer lying loose on the floor of the car.²

¹Jungnitsch v. Michigan M. I. Co. (Mich.), 63 N. W. 296.

²Jones v. Louisville & N. R. Co., 95 Ky. 576, 26 S. W. 590.

H. *Where a Servant Seeks Employment, Ordinarily the Master May Assume he is Competent and that he Appreciates the Danger.*

2718. Where a person of apparently sufficient age, physical ability and mental caliber to perform the service seeks employment at the hands of a railway company or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. "In such a case," say the court, "we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competency for the place, or that will convict the master of negligence for not so doing."¹

2718a. It was said of a section-man that in accepting employment he not only assumed the risks ordinarily incident to the particular service, but he also assumed that he had the capacity to understand the nature and extent of the service, and had the requisite ability to perform it.²

2718b. By the universally-acknowledged rule of the common law, where an employee of age and intelligence enters another's service, he is presumed to understand, and, in the absence of any agreement to the contrary, to assume all the ordinary risks incident thereto, and to reasonably predicate his wages upon the extent of the perils he is to encounter, among which are those he knows are more or less likely to occur through occasional negligence of his co-employees.³

2719. A servant, when he engages in an employment, is held to have done so with a knowledge of the risks of its ordinary hazards, whether from the carelessness of fellow-servants in the same line of employment or from latent defects or the ordinary dangers in the use of machinery and appliances used in the business. The qualification of the

¹ *Pittsburg, C. & St. L. R. Co. v. I. & G. N. R. Co. v. Hester*, 64 Adams, 105 Ind. 151; *O'Neal v. Tex.* 401.

Railway Co., 132 Ind. 110.

³ *Hare v. McIntyre*, 82 Me. 240.

rule is that the master must use all reasonable precautions to select capable and prudent fellow-servants and machinery, and implements properly constructed and of good material.¹

2720. Brakeman.—Where one inexperienced applied for employment as a brakeman and was injured while in the service, it was said that he could not urge his inexperience or that he was not instructed as to the dangers of the service as a ground of recovery. He sought the employment voluntarily. The position sought was one accompanied with danger. The danger was not concealed but apparent. He was not exposed to any extra danger or hazard, nor set at work which he had not sought and engaged to do. He cannot now be heard to say, "I sought my position with a full knowledge of my inexperience, but you knew of my inexperience and therefore insured me against injury. I solicited the service, but you took all the chances. You owed me a duty, but I owed none to myself."²

2721. The law does not impose on a master the duty of informing his servants of all dangers in and about the premises where they are required by his authority to perform labor. The presumption is that the employee understands the nature and dangers of the employment when he engages in the service, and if not, that he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act he is required to perform is dangerous.

This was said where a brakeman was injured while attempting to couple cars at a side-track where there was a platform for loading stone. The platform was located close to the track. It was urged he did not know its distance therefrom and the company was negligent in not informing him of the danger.³

¹Richardson v. Cooper, 88 Ill. 270; Snow v. Housatonic R. Co., 8 Allen, 441; Gilman v. Eastern R. Co., 10 Allen, 233. ²Dysinger v. Cincinnati, S. & M. R. Co., 93 Mich. 646. ³C., R. I. & P. R. Co. v. Clarke, 108 Ill. 113.

2721a. Where a brakeman sought employment, professing an experience of twenty-seven days, and had been at work for defendant over a month prior to receiving injury, where cars with double dead-woods were in common use, frequently saw them, worked on trains containing them, and at the time of his injury saw them on the cars, appreciated the danger in attempting to couple them and attempted the act in the manner that it should be done, as he testified, that is, by reaching under the dead-woods, it was held that the facts did not show negligence on the part of the company.¹

2721b. Where a brakeman was injured while making a flying switch, and it was claimed that he was inexperienced and lacked knowledge of the dangers attending the performance of the act, and that his inexperience and want of knowledge was known to the officers of the defendant company when he was employed, it was held that he could not charge the consequences upon his employer. It was said: It certainly cannot be held that the company is guilty of greater negligence in employing an inexperienced brakeman than he is in soliciting and accepting such employment. Experience in any line of business cannot possibly be gained in any other way than through actual employment in it. By entering the employment of the company as a brakeman he held himself out as competent to perform the duties as such.

The rule was thus stated by the court: A person who solicits and obtains employment in a particular line of duty, even though he makes known the fact that he is wholly inexperienced in that particular occupation, yet holds himself out as competent to perform the duties he undertakes, and cannot charge his employer with the consequences of his own want of knowledge respecting the duties of his employment.²

¹ Fenlon v. Duluth, S. S. & A. R. Co. (Mich.), 66 N. W. 51.

² McDermott v. Atchison, T. & S. F. R. Co., 56 Kan. 319, 43 Pac. 248.

2722. Deck-hand on vessel.—A party accepting employment as a deck-hand holds out to the employer that he is competent to discharge the duties of such employment, and incurs all necessary and reasonable liabilities to accidents incident thereto, and if at the time of hiring nothing is said as to his inexperience, the employer has a right to presume that he is familiar with all the duties of a deck-hand.¹

2723. Employee operating machinery.—A workman is presumed to know whether the machinery operated by him is safe or unsafe, and what effect its operation is likely to have upon surrounding objects. Want of reasonable care in ascertaining these facts will constitute negligence on his part.

This rule was applied to a workman whose duties required him to use a steam-hammer, which, after being repaired and he had resumed its use, jarred loose from overhead a beam which had been temporarily used while making the repairs, and which workmen had negligently failed to remove, and which fell upon him.²

2724. Employee in factory—As to kind of machinery used.—Where an employee in a factory was injured by means of a set-screw upon a revolving shaft, his duties not being connected with the use of the machinery, it was said: When he entered the defendant's service he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say: "I do not care to examine it; I will agree to work in this mill, and I am willing to take my risk in regard to that." In either case he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, as far as these things were open and obvious, so that they could be readily ascertained by such examination and inquiry as one would be expected

¹*Sunney v. Holt*, 15 Fed. 880. ²*Reading Iron Works v. Devine*, See, also, *O'Neil v. St. L., I. M. & S.* 109 Pa. St. 246. R. Co., 9 Fed. 337.

to make if he wished to know the nature and perils of the service in which he is about to engage.¹

2725. Employee in saw-mill.—The fact that a saw-mill hand requested the manager, after he had been for some time employed as an oiler, to retain him in that capacity, does not show that he represented himself as competent for such work, and assumed all risks, in the absence of evidence that he was retained at such risk on account of his request.²

2726. Railroad employees.—It is settled beyond controversy that railroad employees are presumed to understand the nature and hazards of the employment when they engage in the service.³

2727. Employees of a railroad company are presumed to contract with reference to the hazards incident to the service. It is not the duty of such a company to place an employee on the lookout to warn others of approaching danger. It is their duty, without warning, to observe due care, and this is a part of their undertaking, and any omission is at their peril. Hence it was held not negligence *per se* to back a train without providing a watchman on the rear car to warn a switchman of danger.⁴

2728. Ordinarily when an adult person solicits employment in a particular line of work, the act of solicitation is an assertion by the person seeking employment that he is competent to discharge all its ordinary duties; and it is one of the general implied conditions of every contract for service with an adult person that the servant is competent to discharge the duties for which he is employed. It is the fault of the servant if he undertakes without sufficient skill or applies less than the occasion requires.

This was said in reference to an employee who solicited employment in a round-house.⁵

¹ Rooney v. Sewall, etc. Cordage Co., 161 Mass. 153.

⁴ C. & N. W. R. Co. v. Donahue, 75 Ill. 106.

² Guinard v. Knapp, Stout & Co. Company, 90 Wis. 123, 62 N. W. 625.

⁵ Union Pacific R. Co. v. Estes, 37 Kan. 715, 16 Pac. 131; Waugh v.

³ Louisville, N. A. & C. R. Co. v. Shunk, 20 Pa. St. 130.
Buck, 116 Ind. 566.

I. Known or Obvious Dangers.

2729. An employer does not impliedly guaranty the absolute safety of his employees. In accepting an employment, the latter is assumed to have notice of all patent risks incident thereto, or of which he is informed, or of which it is his duty to inform himself, and is further assumed to run such risks.

This rule was applied to a laborer who was injured by the fall of a building caused by the removal of tackle supporting it, where it was claimed such tackle was removed without his knowledge. It was held that, as he clearly could have seen that it was removed, he was chargeable with knowledge.¹

2730. Where there are any dangers about a place where a servant is required to work which are or ought to be known to the master and which are unknown to the servant, the servant should be instructed accordingly. This rule does not require instruction as to those dangers which are the subject of common knowledge or which can readily be seen by common observation.

The danger in this case was such as required special knowledge—the explosive character of molten metal when in contact with water or ice.²

2731. Bridges, elevation of.—It was said in reference to the duty of a railroad company in respect to warning its employees of the danger from low bridges, that when a brakeman is placed on a freight train running on a road with which he is not familiar, and such a train has to pass under a low bridge or bridges, the law, which simply voices the sentiment of humanity, requires that notice be given him of the danger he is to encounter. This notice must be reasonable, that is, he must be reasonably instructed so as to put him on the lookout and on inquiry and observation, that he may inform himself of the locality of the place of

¹ Sykes v. Packer, 99 Pa. St. 465.

² New Albany Forge & Rolling Mill Co. v. Cooper, 131 Ind. 363.

danger. The whole duty is not on the railroad company. The employee must give heed to the notice and instructions given him, and must employ his senses, his reasoning faculties and his attention alike for his own safety and the welfare of the road. If he has not been sufficiently warned or notified to enable him, by proper attention and diligence, to learn where the perils of the danger are, then this would be negligence for which the railroad company would be liable. On the other hand, if he has been sufficiently warned or notified, and from inattention, indifference, absent-mindedness or forgetfulness he fails to inform himself or fails to take the necessary steps to avoid injury, this is negligence and he should not recover.¹

2732. Bumpers, style of.—The use of an old-style bumper does not constitute such a peculiar hazard as to require the company to notify its employees of the danger incident to its being coupled, when it is apparent to the eye that there is not space enough for two cars to be coupled by a man standing between them. The danger of so coupling is obvious, and therefore the company is not bound to warn the servant whose duty requires him to couple cars.²

2733. Where a brakeman of some four weeks' experience in the service was injured while coupling foreign cars with double dead-woods, and it appeared that he had not had any experience in coupling such kind, it was held that it was not negligence to fail to warn such employee of the increased hazard, such risk being apparent and one incident to the risks assumed. It was said that the duty in such cases is to warn the employee of latent dangers, but no duty is imposed to explain to the servant patent dangers which are ordinarily incident to the service, and which it may reasonably be expected, under the circumstances, the servant can see and appreciate. It appearing that the increased hazard in coupling such cars was open to the ordinary observation of any

¹ Louisville & N. R. Co. v. Hall,
87 Ala. 708, 6 So. 277.

² Simms v. South Carolina R. Co.,
26 S. C. 490.

person using reasonable care and prudence, it was not negligence to omit to warn the servant.

To the suggestion that he was obliged to perform this duty in a hurry it was said: That does not change the rule. This impairment of his opportunity for observation would be chargeable to the negligence of the engineer, his fellow-servant.¹

2734. Where a brakeman in the service five or six days was injured while coupling foreign cars with double dead-woods, and his evidence was that he had never before seen cars thus equipped and had not been warned of the danger, it was held that the defendant should have instructed him as to the dangers — in fact should have given him an object lesson,— and therefore a verdict directed for the defendant was error.²

2734a. It is not an omission of duty on the part of a railroad company to fail to warn an inexperienced brakeman of the greater danger incident to coupling cars that are supplied with double dead-woods than cars having the ordinary device, where he is familiar with the latter. Such increased danger is obvious and one incident to the service.³

2734b. It is the duty of a railroad company to instruct an inexperienced brakeman as to the proper method of coupling foreign cars where the appliances for coupling are of a different kind than those upon its own cars and the danger greater, where such cars cannot be coupled in the same manner with safety.⁴

2735. Where the claim on the part of a brakeman who was injured while coupling cars with double dead-woods was that by reason of his inexperience he should have been warned of the danger, his testimony being to the effect that he was ignorant thereof, and it appeared he had served five

¹ Louisville & N. R. Co. v. Boland, 96 Ala. 626, 11 So. 667; Norfolk & W. R. Co. v. Cottrell, 83 Va. 512, 3 S. E. 123; East Tennessee, V. & G. R. Co. v. Turvaille, 97 Ala. 122, 12 So. 63.

² Reynolds v. Boston & M. R. Co., 64 Vt. 66, 34 Atl. 136.

³ Boland v. Louisville & N. R. Co. (Ala.), 18 So. 99.

⁴ Illinois Cent. R. Co. v. Price, 72 Miss. 862, 18 So. 415.

years as a brakeman upon one of the principal roads of the country, that he was twenty-three years of age, and the instruction to the jury was such that the appellate court assumed that the trial court had assumed as a matter of law that such employee was inexperienced, it was held that the question should have been submitted to the jury upon all the evidence.

The court approved of what was said in *Kelley v. Abbot*, 63 Wis. 607, which was in effect that the risk of coupling cars of such character was one incident to the employment of a brakeman.¹

2736. Clutch, absence of on windlass.—Where an inexperienced employee while working a windlass was injured as he was lifting by means thereof a heavy timber or pile, by the handle slipping from his hand, caused by the heavy weight of the timber, and it was alleged that the machine was defective in that it had no clutch or contrivance to prevent its turning back, of which he was ignorant, it was held that he was entitled to recover.²

2737. Cogs or gears exposed.—One who attempts to do work which exposes him to obvious, known and appreciated dangers assumes the risk of injury, and, however the knowledge may have been acquired, there is no obligation upon the employer to give the workman warning of a known danger. This was said where the evidence disclosed that a youth sixteen years old appreciated the fact that the position he assumed in adjusting a belt exposed his arm to liability to injury from the gears. It was held that in order to bar a recovery it was not necessary that he should appreciate the whole extent of the danger.³

2738. An employee is not bound before beginning work to familiarize himself with the condition of the machinery he may come in contact with. It is enough if he knows his own

¹ *Hughes v. C., M. & St. P. R. Co.*, 79 Wis. 264.

³ *Downey v. Sawyer*, 157 Mass. 418; *Rooney v. Sewall, etc. Cordage*

² *Carter et al. v. Cotter*, 88 Ga. 286, 14 S. E. 476. Co., 161 Mass. 153.

work and the risks directly connected with it. Hence, where an employee in a saw-mill, whose duty it was to carry slabs from the gang and place them on the rollers, was pulling one too heavy for him to carry, walking backwards, and while so doing accidentally slipped upon some bark and fell against exposed cog-wheels, causing him injury, and it appeared he had no actual knowledge of their existence, and had not been warned of the danger from them, but it did appear that he could have seen them if he had stopped work to look, it was held that it could not be said as a matter of law that he had assumed the risk. The injury having been caused by an unusual risk, the burden of proving knowledge thereof was upon the employer.¹

2739. Where the plaintiff, who was twenty-four years old, was injured while cleaning the commutator in the defendant's electric car, by contact with unguarded gears, and it appeared he had been instructed in the duties of a motor-man for eight days prior to performing active work and was injured the third day after commencing such work, and that his duties were to clean the commutator while the car was in motion when required, and the danger of injury from the gears was obvious to a person of ordinary intelligence, it was held that such danger was a risk incident to the service which he assumed.²

2740. Coupling cars, method of.—It was held that a switchman could not be heard to claim he ought to have been instructed, where it appeared he was about twenty-two years old, had been employed as such for three weeks, had known the tracks in the yards for about three months, and knew all that was necessary to enable him to couple and uncouple cars, and when at the time of the injury he was uncoupling cars in a necessary and proper manner.³

2741. Knives of a machine.—Where a boy nineteen years of age had been employed in defendant's machine-

¹ *Swoboda v. Ward*, 40 Mich. 420;
Nadau v. White River Lumber Co.,
76 Wis. 120.

² *Burnell v. West Side R. Co.*, 87
Wis. 387.

³ *Cincinnati, N. O. & T. P. R. Co.*
v. Mealer, 50 Fed. 725.

shop for about three weeks, his duty being to take dressed lumber from a machine, and he was ordered by the foreman to place a hood, used with the machine, in its place in front of the knives, and in so doing his hand came in contact with the knives, causing him injury, and the negligence charged was the omission to give him instructions, it was held that, as the plaintiff had full opportunity to observe the handling of the hood, it was not negligence to ask him to place it upon the machine without instructions, especially as he asked for none; that if the operation was specially dangerous, the danger was obvious and he was not bound to obey the order, and in doing this he took the risks.¹

2742. Where a young man twenty years of age employed as a hostler in the defendant's stables was sent by the defendant's foreman to assist in cutting hay with a machine, the knives of which were plainly visible, and, upon the machine becoming clogged, the plaintiff, in attempting to loosen the hay, grasped the tuft with his hand, whereby his hand was drawn in and fingers cut off, it was held that the danger was apparent and the defendant was not negligent in failing to instruct the plaintiff as to it. It was said the duty of an employer to give instructions to one about to work on dangerous machinery exists only when there are dangers in the employment of which he has or ought to have knowledge, and which he has reason to believe his employee does not know and will not discover in time to protect himself from injury. In the early cases the doctrine was applied to boys. In favor of adults it should be applied with great caution. Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and

¹ *Crown v. Orr et al.*, 140 N. Y. 450.

average intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved.¹

2743. Locomotive, character of known to engineer.—

It was said there is no duty on the part of a railroad company to instruct a skilled and experienced engineer of the dangers of a locomotive which he is sent out to operate, where the new locomotive is of the same general character as the one to which he had been accustomed; nor can he predicate a right to recover for an injury received while passing through a bridge with which he is familiar by reason of the fact that the cab of the new engine is six inches wider than the old.²

2744. Moving cars by staking.— The danger of moving cars by staking, because of the liability of the stake to break in the hands of the person holding it, is so obvious that a master may assume that a servant ordered to undertake it will see and comprehend the hazard, and he is not liable for a failure to give warning.³

2745. Rollers on machine.— Where the servant injured was thirty-two years old, and was assumed to be familiar with machinery, and the machine which caused him injury was simple in construction and the danger obvious, the manner in which he was injured being that of getting his hand between the rollers, it was held the defendant was not negligent in failing to warn him of the danger, though it be assumed it was his duty to run the machine during the temporary absence of the person in charge of such machine.⁴

2746. It was held that a woman who had worked several weeks upon a machine understood and comprehended the danger of getting her fingers between revolving cylinders.⁵

¹ *Stuart v. West End St. R. Co.*, 163 Mass. 391, 40 N. E. 180.

⁴ *Richstain v. Washington Mills Co.*, 157 Mass. 138, 32 N. E. 908.

² *Bellows v. P. & N. Y. C. & R. Co.*, 157 Pa. St. 51.

⁵ *Connolly v. Eldridge*, 160 Mass. 566.

³ *Watts v. Hart et al.*, 7 Wash. 178, 34 Pac. 423.

2747. Saw on lath machine.— It was held by a divided court a question for the jury whether a carpenter set at work at a lath machine, and injured some ten or twelve days after he commenced such work, while cleaning the debris from under the machine, by his hand coming in contact with a saw which protruded two or three inches below the bench, thus being to some extent concealed, should have been instructed as to the danger from such source. It was said, however, the usual danger of contact with such dangerous implement as a circular saw in rapid motion is obvious to all who have reached the years of discretion, when it is in plain sight.¹

2748. It was held, where an employee who had worked twenty days near an exposed circular saw, who knew that the saw was uncovered, and was injured by his slipping upon the floor, forcing his foot against it, that it could not be held as a matter of law that he assumed the risk. That whether he knew or ought to have known and appreciated the risk and danger was a question for the jury.²

2749. It was held that the master's duty required that an inexperienced hand should have been warned of the danger of removing accumulated sawdust from under a lath machine he was operating, where the saw extended through and under the table, though at the time of the injury the plaintiff had been operating the machine several days and had cleaned it before, but always stopped its motion while so doing.³

2749a. An employee, on the day after his employment to work upon a machine in a mill used for cutting off the ends of lath, was injured by slipping and falling upon projecting saws. It was alleged that the defendant was negligent in permitting an accumulation of bark and sawdust to remain upon the floor where he stood, and in not covering the saws, and in failing to instruct him as to the dangers, he being

¹ *Campbell v. Eveleth*, 83 Me. 50,
21 Atl. 784.

² *Darcey v. Farmers' Lumber Co.*,
87 Wis. 245.

³ *Campbell v. Eveleth*, 83 Me. 50.

thirty-five years old and inexperienced. It was held that the risks were incident to the service which he assumed. It was said the rapidly-revolving saws were in plain sight, where the plaintiff could not help but see them, and he knew perfectly well, without instruction or information, that if he fell upon them or came in contact with them he would be injured. In respect to the accumulation of sawdust and refuse upon the floor, he must be held to have known that his footing would be insecure, and that it exposed him to the danger of stumbling and falling. He did not need, and had no right to expect, any instruction or caution regarding a matter so entirely obvious to the humblest intelligence.¹

2750. It was said that to hold that an employer was negligent in failing to warn a carpenter that a circular saw was a dangerous machine and of its liability to throw a stick, if one got upon the saw, would be preposterous.²

2750a. It was held that there was no duty resting upon the master to inform an experienced workman with a lath-saw of the danger of a stick being caught and thrown in the direction of the revolution of the saw.³

2751. Set-screw.—It was held it was not negligence to omit to give warning of danger from a set-screw attached in the ordinary way upon the shaft, to a servant who was a mechanic of mature years, who had worked upon the premises for some time, and might have performed his work without danger by adopting a different mode of reaching it.⁴

2752. Where, however, an employee who had been engaged as an oiler of machinery in a very large saw-mill from some time in April until the 9th day of July following, on which latter day he was injured by reason of his clothing getting caught in a set-screw on a rapidly revolving shaft, and he claimed he had no knowledge of the set-screw, it was held that the question whether he should have been informed as to its being there was properly a question for the jury.

¹ *Hazen v. West Superior Lumber Co.*, 91 Wis. 208.

² *Delaware R. I. S. Building Co. v. Nuttall*, 119 Pa. St. 149.

³ *Mississippi River L. Co. v. Schneider*, 74 Fed. 195.

⁴ *Keats v. National Heeling Machine Co.*, 65 Fed. 940 (C. C. A.).

It was said an instruction as follows should have been given: "It is the duty of the plaintiff to look at the machinery about which he is employed to work, and to apprise himself of any danger afforded by the machinery itself, or which he could have discovered by a proper examination thereof, or by the use of his sight or other senses, and if he failed during the course of his employment, and while engaged in the task of oiling the machinery, to apprise himself of the dangers which ought to have been seen, then the plaintiff was not in the exercise of ordinary care or prudence, and it is your duty so to find."¹

2753. The rule was stated that where a servant put at work upon a dangerous machine is known to be without experience in the particular work and without knowledge of the actual dangers attending it, the master is bound to give him such information as will cause him to fully understand and appreciate the danger attending the employment, and the necessity for care.

This rule was applied where an employee in a saw-mill was injured while running a scantling machine and saw, in the attempt to remove a sliver from under the saw, by his sleeve catching in a concealed set-screw fixed upon and projecting from a shaft below the saw.

It was held that the master was negligent in not instructing him as to the position of such set-screw, notwithstanding the fact that he had been employed in the mill for two years, had worked as an assistant upon the machine in putting lumber in place to be cut by the saw for nine months, and had during that time, in the absence of the foreman, run the machine for eighteen days. Upon the question of negligence on the part of such employee it was held for the jury to determine, notwithstanding the fact that he could have stopped the machine, and that if he did not know of the presence of the set-screw he must have known that he was putting his hand in a place of concealed danger. It ap-

¹ *Guinard v. Knapp, Stout & Co. Company*, 90 Wis. 123, 62 N. W. 625.

peared, however, that he had seen his foreman do the same thing.

(The decision first rendered in this case in the 25th Pacific Reporter was directly the reverse upon both propositions. It is not published in the reports. The one which I have condensed above contains no reference to any former decision, nor does the report of the case show that it was rendered upon a rehearing. Its history must be in the records of the court as well as the reasons for such an unwarranted change of opinion.)¹

2754. It was held, where an employee working near a clutch in a mill where his duties required him at times to step over a rapidly-revolving shaft upon which were projecting screws, that notwithstanding the shaft was in plain sight, and the dangers therefrom obvious, yet whether he should not have been warned of the danger of the projecting screws was under the circumstances a question for the jury.²

2755. Shaft in a mill.—Where an employee in a mill was ordered by the foreman to go up a ladder which was standing against a belt-box into which a revolving shaft was running, and nail a board on the box, and it appeared he had worked in the mill a long time and was acting within the scope of his duties, and that he was injured by his apron and jacket catching in the shaft, which was plainly visible and was observed by him, and he could have moved the ladder to the opposite side of the box, where there would have been no danger, and it was urged that he was sent into a place of concealed danger without warning and instruction, it was held that the facts would not support the claim.³

2756. Trimming grind-stones.—Where an employee had worked in a machine-shop for a year and had seen grind-stones trimmed by others, and had been shown by the foreman how to trim them, and had worked upon one himself

¹Ingerman v. Moore, 90 Cal. 410. ³Russell v. Tillotsen et al., 140

²Roth v. Northern Pacific Lum- Mass. 201.
bering Co., 18 Oreg. 205, 23 Pac. 842.

once before the accident to him, and he was injured by the iron bar which he was using to hold the stone, thus crushing his hand between the bar and the stone, it was said that the danger must have been as apparent to him as to one of more experience, and therefore he assumed the risk.¹

2757. Water-pipe resting on blocks, liability to fall.—An employee was injured while assisting to raise a section of water-pipe in a trench by its falling from the temporary blocks upon which it rested. It was urged that the employer was negligent in not informing him of the dangers incident to his work. It was held there was no evidence to sustain that position. It was said: These dangers were visible, and any man of ordinary intelligence, in the exercise of ordinary care, although not an expert in the business, could not have failed to comprehend them. In such case the employer is under no legal obligation to warn the servant of danger.²

J. Minors.

2758. The duty of the master in respect to the employment of young and inexperienced children is not only to warn them, but to instruct them as to the dangers of the employment and the means of avoiding them. This duty performed, they stand upon the same plane with other servants in reference to the risks incident to the employment and those arising from want of care in their fellow-servants.³

2759. The law recognizes the right of a master to employ an infant in a hazardous occupation on condition that he shall furnish such infant with such information relative to the perils of his situation as will enable him to comprehend the dangers and understand how to avoid them. But it is an actionable wrong for a master to expose in a hazardous

¹Melzer v. Peninsular Car Co., 76 Works Co., 77 Wis. 51. See ASSUMED RISK, 503 et seq., 639 et seq. Mich. 94, 42 N. W. 1078.

²Johnson v. Ashland Water ³Fisk v. Central Pacific R. Co., 72 Cal. 38.

employment one whom he knows to be lacking in capacity to understand and appreciate the dangers surrounding him, however much he may have been instructed.¹

2760. The complaint must show one of three things:

1. That the child was too young to be put to the service he was required to perform.

2. That he did not have notice or knowledge of the augmented danger caused by the master's neglect.

3. That the master, knowing the age and inexperience of the child, neglected to give him necessary warning and instruction.²

2761. The fact that a young and inexperienced employee, though using ordinary care, was injured while engaged in dangerous work of whose perils he had not been warned and was ignorant, does not entitle him to recover, if the injury was solely the result of a co-employee's negligence, or if it was not caused directly by the dangerous character of the work, or if he should have comprehended the danger; that is, if an ordinarily prudent person of his age and experience under like circumstances would have appreciated the danger and risk.

The facts are not important, as no application of the law was made by the court. The rule was expressed where the court had under consideration an instruction.³

2762. It is a fact, if proved, tending to show gross negligence in a railroad company, to employ any inexperienced person, knowing such person to be ignorant of the business for which he is employed, in any hazardous or dangerous business, unless such company make known and fully explain the hazard and danger connected with such business, and instruct such person how to avoid the danger. Youth is an evidence of inexperience, and greater strictness of the rule should be required in the employment of minors than in

¹ *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502; *Pittsburg, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187.

² *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Brazil Block Coal Co. v. Gaffner*, 119 Ind. 455.

³ *Craven v. Smith*, 89 Wis. 119.

those of mature years, even when employed by and with the consent of their parent or guardian.¹

2763. Knowledge of minor.—In an action to recover damages for injuries received by an infant who is *sui juris* from coming in contact with machinery while in defendant's employ, proof that the employer omitted to instruct the employee as to using the machinery does not impose liability upon the former, provided the latter knew, by experience or observation, the nature of the machinery and the danger to be apprehended from it.²

2764. If a child employed upon machinery has gained from any source the knowledge how to use it, the master's neglect to give him instruction will not make him liable for the child's injury caused by the machinery.³

2765. Voluntarily meddling with machine.—The absence of guards required to be placed upon all gearing and belting in a factory where women and children are employed imposes no liability upon the employer in a case where an infant employee, knowing of their absence, voluntarily meddles with the machinery and is injured.⁴

1. Capacity to Appreciate the Dangers.

2766. Persons who employ children to work with dangerous machinery or in dangerous places should anticipate that they will exercise only such judgment, discretion and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution in the exercise of such care in that behalf, it is the duty of the employer to so instruct

¹ St. Louis & S. E. R. Co. v. Valerius, 56 Ind. 511.

113 N. Y. 540; Ogley v. Miles, 139 N. Y. 458.

² White v. Wittemann Lithographic Co., 131 N. Y. 631; Hickey v. Taffe, 105 N. Y. 26; Buckley v. Gutta Percha & Rubber Mfg. Co.,

³ Sullivan v. India Mfg. Co., 113 Mass. 396.

⁴ White v. Wittemann Lithographic Co., 131 N. Y. 631.

such employees concerning the dangers connected with their employment, which dangers from their youth and inexperience they may not comprehend or appreciate, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom. Such an employee who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of his employer's negligence, may maintain an action therefor against the employer, notwithstanding that by reason of his youth and inexperience, and the failure of the employer to properly instruct him, he did some act in the performance of his duty according to the judgment and knowledge he possessed which contributed to the injury, but which he did not know and was not advised would be likely to injure him.

The facts were that a boy less than fourteen years old was required to start and stop an engine where, by reason of his size, he had to stand near rapidly revolving gears and belts, one of which belts was more than ordinarily dangerous by reason of being loose.¹

2767. The measure of a child's responsibility is his capacity to see and appreciate such danger, and the rule is, in the absence of clear evidence of the lack of it, that he will be held to such measure of discretion as is usual in those of his age and experience. The measure varies, of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of intelligence, foresight or strength usual in those of such age.²

¹ *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283. 358; *Sandford v. Railway Co.*, 136 Pa. St. 84; *Oakland Railway Co. v.*

² *Kehler v. Schwenk*, 144 Pa. St. 348; *Same Case*, 151 Pa. St. 505. *Fielding*, 48 Pa. St. 320; *Greenway v. Conroy*, 160 Pa. St. 185. See, also, *Ranch v. Lloyd*, 31 Pa. St.

2768. A boy less than fourteen years of age has not obtained the age when sufficient capacity to be sensible of danger and avoiding it is presumed. A boy's capacity is the measure of his responsibility, and if he has not the ability to foresee and avoid danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself. Hence, it was held a question for the jury whether a boy less than fourteen years of age comprehended the danger and appreciated the risk from the use of an elevator without guards, where he was injured by his foot projecting over the platform, coming in contact with the sill of a floor.¹

2769. An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it, and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age. When an infant's responsibility for negligence is presumed to commence is a question for the court and not for the jury.²

2770. Where a youth seventeen years and seven months old was injured by contact with cogs which were elevated six or seven feet from the floor, while attempting to oil them, it was said: He was not in law an infant of tender years. In this state (Kansas) if a minor be over fourteen years of age and of sound intelligence he may select his guardian. If over sixteen years of age and convicted of any offense, he must suffer the punishment prescribed by law to the same extent as if he had reached majority. The plaintiff, therefore, will be presumed to be sensible of danger and to have the power to avoid it, and this presumption will stand until overthrown by evidence of the absence of such discretion as is usual with persons of his age. The doctrine that it may be negligence to set an infant of tender years at work upon a dangerous machine without pointing out its dangers, in

¹ *Strawbridge v. Bradford*, 128 Pa. St. 200.

² *Nagle v. Alleghaney R. Co.*, 88 Pa. St. 35.

view of the age of the plaintiff and the time he had worked in the shop, does not apply.¹

2771. The Texas court does not concur with the courts of some of the other states in the doctrine that a minor of the age of fourteen is presumed to comprehend the dangers incident to an employment until the contrary appears, but hold to the rule that if a servant be under twenty-one years of age, and has not been instructed by the master as to the dangers of his employment, it is a question for the jury whether he has acquired sufficient knowledge of the dangers to exempt the master from liability in case of injury.²

2772. There is no presumption of law that a minor over fourteen years of age, who applies for a position involving dangerous service, is aware of the danger and needs no instruction. The obligation to instruct an employee, before putting him at work, as to any of his duties which are dangerous, does not necessarily follow, as a matter of law, from his minority when employed. His inexperience, the fact that the service is dangerous, and the fact that his inexperience is known to the master, are considerations involved.³

2773. It was also said by the Wisconsin court, in reference to a young man over eighteen years old injured in rolling logs, that he was a minor, so there was no presumption that he understood and appreciated the danger.⁴

2773a. The mere fact that an employee is a minor does not require that the question of his assumption of the risk should be submitted to a jury, where the danger is clearly obvious to one of his age and experience, and there is nothing in conditions requiring special skill or experience; the question of assumption of the risk is clearly one of law for the court.⁵

¹ *Sanborn v. Atchison, T. & S. F. R. Co.*, 35 Kan. 292, 10 Pac. 860. ³ *Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763.
See *Greenway v. Conroy*, 160 Pa. St. 185, 28 Atl. 692. ⁴ *Wolski v. Knapp, Stout & Co. Company*, 90 Wis. 178, 63 N. W. 87.

² *Tex. & Pac. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *White v. Water Works Co. (Tex.)*, 29 S. W. 355.
⁵ *Herold v. Pfister (Wis.)*, 66 N. W. 252.

2774. It was held proper for the court to refer to the jury for their determination, from their observance of the injured employee as a witness and their hearing of his testimony, the question of how much allowance should be made for his youth in determining the degree of care and discretion to be expected of him by his employer, where he was a minor and was injured in a dangerous employment. (The boy was nearly nineteen years old.)¹

2775. It was held that whether an inexperienced lad employed as a brakeman should have been warned of the danger from unblocked frogs was a question for the jury. The age of the lad is not disclosed.²

2776. To justify a master in the employment of an ignorant and inexperienced infant in a hazardous calling, such infant should possess at least sufficient capacity to understand the dangers of the situation and to appreciate the importance of heeding prudent warnings for his safety.³

2777. The question, where the capacity of the servant is involved, is not what a minor servant in fact knew or comprehended as to the danger to which he was exposing himself, but what he ought to have known and understood in view of his age, intelligence, discretion and judgment, and upon request the jury should be so instructed. It was held in this case, and the law stated to be in reference to minors, that the capacity of one such is a question for the jury.⁴

2. Twelve Years Old.

2778. If a child of tender years is sent by the master or his superintendent, with or without instructions, where he will be exposed to revolving wheels, belts and pulleys, any one may know that by reason of his inexperience and immature

¹Disotell v. Henry Luther Co., 90 Wis. 635, 64 N. W. 425.

²St. Louis, I. M. & S. R. Co. v. Davis, 55 Ark. 462, 18 S. W. 628.

³Taylor v. Wootan, 1 Ind. App. 188, 27 N. E. 502.

⁴Luebke v. Berlin Machine Works, 88 Wis. 442. See, however, Casey v. Railway Co., 90 Wis. 113, 62 N. W. 624.

judgment he is liable to be maimed or killed, and if he is injured while using due care for one of his capacity, it would seem too clear for argument that the master should be liable. To say that such a child takes the risk of his employment, that if he is not willing to take the hazard of obeying the command he must refuse, is idle, if not cruel. By his inexperience he is unable to comprehend the risk. By his childish instincts he implicitly obeys. This was said in reference to a boy twelve years old, who was injured while oiling machinery.¹

2779. Where a boy twelve years old and of average intelligence who had worked in the same room with, but not upon, certain machines having revolving gearing on the outside in plain sight, while obeying the order of an overseer to go between machinery and get a tool, the order being accompanied by a direction to hurry up, was injured by contact with such exposed gearing of one of the machines, it was held that he could not maintain an action against his employer on account of the injury thus received upon the ground of failure to instruct and warn him as to dangers to which he was exposed. It was said that in the absence of anything to show the contrary, he must be assumed to have had the intelligence and understanding usual with boys of his age. It must be assumed he was well aware of the danger of coming in contact with the revolving cogs, and no instruction could have been given him that would have informed him more than he knew.²

2780. Upon a second appeal there was evidence before the court that the place was dimly lighted; that the boy had less than the average intelligence; that he had never worked so near the machines as to have occasion especially to consider the risk of injury therefrom, and it was held that the question whether he had assumed the risk was properly submitted to the jury, solely upon the evidence relating

¹Hinckley v. Horazdowski, 133 Ill. 359, 24 N. E. 421; Same Case Co., 146 Mass. 182.
(Ill.), 23 N. E. 338.

²Ciriack v. Merchants' Woolen

to the intelligence of the boy. It was said that in employing a boy twelve years old and apparently of average intelligence, an employer is not called upon to tell him if he holds his hand in the fire it will be burned, or strikes it with a sharp instrument it will be cut, or thrusts it between the teeth of revolving cogs in the gearing of a mill it will be crushed.¹

2781. Where a minor is familiar with a machine, and its character and operation is obvious, and is aware of and fully appreciates the danger to be apprehended from working it, he takes upon himself the risks incident to the employment, the same as a person of mature years.

This was said in reference to a boy twelve years old employed to assist in operating a machine in the defendant's factory. He had been employed but three days when, attempting to put a cylinder in place, his foot slipped, and in throwing out his hand to save himself it was caught in some cogs near the cylinder.

It was held that an action against the employer could not be maintained, as the danger was apparent; that the injury was caused solely by the accidental slipping of the foot; therefore the fact that plaintiff had not been warned was immaterial.²

2782. Where the employer of a child furnishes him with a safe and suitable place to work, he is not liable for injuries sustained by the child by reason of his voluntarily going about the factory and exposing himself to dangerous machinery, where the child is of such age and experience and has sufficient knowledge of the machinery to be able to appreciate its dangerous character. This was said in reference to a child under twelve years of age.³

2783. Where a boy twelve years old was set at work in carrying lumber from a planer after it had been properly

¹ *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152.

³ *Evans v. American Iron & Tube Co.*, 42 Fed. 519.

² *Buckley v. G. P. & R. M. Co.*, 113 N. Y. 540.

dressed, and was injured by his hand or arm getting caught in the cylinder upon such machine, there being openings in the floor into one of which he stepped and was thrown upon the machine, and the court was requested to charge in substance that if he at the time of his employment was warned that the planer was dangerous, that he must keep away from the same while running, and that afterwards he was injured by going too near the planer, the verdict should be for the defendant, it was held that such instruction was properly refused. It was said: It appears that the boy was but twelve years of age, that he had worked two and one-half days for the defendant, and was wholly inexperienced in the running and operation of the machinery in the factory; under these circumstances it cannot be declared as a matter of law that the employers absolved themselves from responsibility by simply telling the boy of the dangerous character of the machinery and warning him to keep away from it while it was in motion. They knew his age and inexperience, and it was their duty to have so graduated their instructions to his youth, ignorance and inexperience as to have enabled him to fully understand and appreciate the dangers surrounding him, and to have placed him with reference thereto in substantially the same relation as if he had been an adult.¹

3. Thirteen Years Old.

2784. It was held that a boy thirteen years old did not assume the risk of uncovered gearing of a machine located so near his place of work that from inattention on his part he was likely to get his hands in contact with it.²

2785. The fact that an employee is young and that a possible injury might arise from unexpected causes, without negligence established, should not be made the basis of liability. Hence, where a boy thirteen years old was injured while cleaning a machine which from some unexplained

¹ Taylor v. Wootan, 1 Ind. App. 188, 27 N. E. 502.

² King v. Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10.

cause started, and it appeared he had been properly instructed, it was held there was no ground for recovery.¹

2786. The employer is not liable if the young person had experience from which knowledge of the danger may reasonably be presumed, and that discretion which prompts to care. This was said where a boy thirteen years old was injured while attempting to clean a "woolen mule," a dangerous service; and where the evidence was conflicting as to his having been instructed or having gained by experience or otherwise knowledge of the danger of cleaning the machine, it was held that the question was for the jury.²

2787. Whether a girl thirteen years old, who was inexperienced in cleaning the wheels of a machine used in a factory, ought to have been instructed as to the manner of cleaning the machine and the dangers attending the work, was held to be a question for the jury.³

2788. It was held a proper question for the jury whether a boy thirteen years old, who was injured while working upon a large machine used in connection with the making of spectacles, was of sufficient capacity to appreciate its dangers, and also whether under the circumstances the machine was dangerous.⁴

2789. Where a boy thirteen years old was injured by his hand coming in contact with a saw while operating a lath-saw in a mill, where he had been at work taking materials from the saw, occasionally operating it, from the month of June until the 8th day of September following, which was the date of his injury; and the claim was that he had not sufficient capacity to perform the service and appreciate the danger, that there were safer machines in use which should have been provided, and that he should have been but was not instructed as to its use and the risks and dangers, it was held that these questions upon the evidence were proper

¹ *Ash v. Verlenden*, 154 Pa. St. 246.

³ *Glover v. Dwight Mfg. Co.*, 148 Mass. 22.

² *Tagg v. McGeorge*, 155 Pa. St. 368.

⁴ *Steiler v. Hart*, 65 Mich. 644.

for the determination of the jury. It was further held that evidence as to his apparent intelligence and capacity was inadmissible, where he was examined as a witness before the jury, who could thus form as good an idea of his intelligence as that of any witness.¹

2790. It was assumed that a boy thirteen years old, who was injured while, at the request of another employee, he was pulling out a lever in a machine and accidentally placed his hand in cogs which were a part thereof, that he had intelligence enough to take care of himself, and to understand and appreciate the machinery and the danger to be apprehended from it.²

2791. Where a boy thirteen years old was injured while working a heavy machine for cutting tin, called shears, which was too large for him to successfully operate, and while he was using it for his own purposes with the consent of his employer, and the charge was that the master was negligent in not preventing him from using it, it was held the questions of the boy's capacity and the master's negligence were for the jury.³

2792. Where a boy thirteen years old was injured while riding in his employer's elevator in a mill, caused by his extending his person over the rail of the elevator and its coming in contact with the sides of the shaft, it was said: He was an unusually bright boy, nearly thirteen years old, and therefore *sui juris* and capable of caring for his own safety. He had been at work in the mill for over a month, and during that time had ridden daily on this elevator. Holding him responsible simply for the exercise of such care and vigilance as could reasonably be expected from one of his age and capacity, it seems to us that but one conclusion can be arrived at, to wit, that he was guilty of gross carelessness and negligence.⁴

¹ Sprague v. Atlee et al., 81 Iowa, 1, 46 N. W. 756.

² White v. Wittemann Lithographic Co., 131 N. Y. 631.

³ Wynne v. Conklin, 86 Ga. 40, 12 S. E. 183.

⁴ Ludwig v. Pillsbury, 35 Minn. 256.

2793. Whether a boy thirteen years old, who was directed to go in front of a car and pull, thus assisting others, who were pushing it, to move the car, and, stumbling, was run over by the car, had sufficient discretion to appreciate the danger, was held a question for the jury.¹

4. Fourteen Years Old.

2794. The fact that an employee is a minor does not alter the rule (assumption of risks) if he fully appreciates the danger and is competent to perform the work. Hence, it was held that a girl fourteen years old who was injured by getting her hand between the rollers of an ironing machine she was operating, and which she had operated for more than six weeks without injury, sufficiently appreciated the danger from the fact of such use, and could not recover upon the ground that she was not instructed as to the danger and was not of sufficient age to comprehend it.²

2795. It was said: In rare instances, such as presented by the case of *Rummell v. Dilworth*, 131 Pa. St. 509, it has been held the employment of young and inexperienced persons to work amidst dangerous machinery imposes the duty upon the master of warning such employees of the latent dangers involved in their work. But this kind of liability is a very refined one at best, and the essential fact of the existence of the latent danger as the source of a consequent duty as to information must necessarily be established clearly before any charge of negligence can be sustained.

Where the work and place are not dangerous, and the materials are those in common use, there is no liability of the master to an employee injured by an accident as for a breach of duty of protection by previous instruction and warning.

This was said where a boy fourteen years old was employed to take bottles of ale from a shelf and assort them, and one of the bottles, filled with ale, broke.³

Rhodes v. Georgia R. & B. Co.,
84 Ga. 320, 10 S. E. 922.

³ *Melchert v. Smith Brewing Co.*,
140 Pa. St. 448.

² *Hickey v. Taffe*, 105 N. Y. 26.

2796. Where a boy fourteen years old was employed in a cotton-mill and his duties were to wipe rollers when not in motion, an employment not dangerous, and he after months of service attempted to wipe them while in motion and was injured, it was held that he had no cause for recovery; that no special instructions were required.¹

2797. Where a boy fourteen years old was employed as a trapper in a mine, his duties being to open and close doors of a tunnel leading into the mine, and he was directed by the superintendent to assist the drivers in charge of trains, and while assisting such he stumbled over a piece of coal lying in the track, which he had previously seen there, and sustained injury, it was held that the evidence was sufficient to justify the jury in finding the employer guilty of negligence.

The court seem to predicate their conclusion upon what was said in *Railroad Co. v. Fort*, 17 Wall. 553, that the work required was more dangerous than that for which he was employed, and therefore it was a question which the jury might consider and decide whether the boy had reached such maturity as to understand the danger to which he was exposed.²

2798. Where it appeared the boy was fourteen years old, of small size for his age and physically weak, that he was employed as a slate-picker, but against his will he was ordered to drive a dump-car, a service in which he had no experience, and one which was highly dangerous, requiring more strength and discretion than he was presumed to possess, it was held that the question of the master's liability upon the facts was for the jury.³

2799. Where a boy less than fourteen years old was set at work at a machine in a room where a great number of machines were running, making a great noise, and near the machine which the boy was operating was another having

¹ *Zurn v. Tetlow*, 134 Pa. St. 213.

³ *Kehler v. Schwenk*, 151 Pa. St.

² *Northern Pacific Coal Co. v. Richmond*, 58 Fed. 756 (C. C. A.).

etc. *Canal Co.*, 153 Pa. St. 379.

revolving cogs, with which, unless strict attention was paid, the boy's hands were likely to come in contact, and it appeared he was inexperienced with machinery and had only worked one day, when he was injured by his hand getting into such exposed gearing, it was held the jury were justified in finding that he should have been instructed as to the dangers surrounding his employment, even though the dangers were obvious to an older person, the cogs being in plain sight.¹

2800. The presumption is that a boy under the age of fourteen years is not competent to perform duties involving the personal safety of others and requiring the exercise of a good degree of care and watchfulness; and in an action for injuries resulting to others from the negligence of the boy so employed, the burden is upon the employer to show that he was in fact competent. This was said where a boy less than fourteen years old was employed to signal the engineer when buckets of coal were filled in the hold of a vessel so as to be hoisted to the deck, and the boy gave a signal prematurely, whereby the hand of one of the men at work in the hold of the vessel was torn and lacerated by a hook at the end of the cable.²

2801. Whether a boy fourteen years old, who was injured while feeding a picking machine with wool by his hand being drawn in between the rollers, which were in plain sight, where it appeared he had been operating the machine for two weeks, should have been warned of the danger, was held a proper question for the jury. It was said: It was not improbable that a great many boys, and even men of ordinary intelligence, without experience with machinery, and with a limited knowledge of the principles of mechanics, who, while knowing and seeing that the rollers drew in wool compressed almost to the thinness of paper, could yet, like this boy, fail to realize or appreciate that they would suddenly compress and draw in, as quickly as it came in the

¹ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

² *Molaske v. Ohio Coal Co.*, 86 Wis. 220.

slightest contact with them, an object like the hand or fingers, many times thicker than the aperture between the rollers.¹

2802. It could not be assumed that a boy over fourteen years of age, with six months' experience in a machine shop, is incapable of forming a judgment of the danger of putting a belt on a moving pulley, especially when warned by an older and more experienced person.²

2803. It was held that a boy fourteen years old, employed in a tin-shingle factory for the purpose of shoving pieces of tin under a stamping machine, who was injured the second day he worked by having his hand caught under such machine, could not recover from the master on account of such injury. It was said: There was no danger in this particular machine that was not as obvious to a boy of fourteen as to an adult. He could see that if he placed his hand under the stamp it would be crushed. If boys are not allowed to use machinery until they have become accustomed to its use, it would be difficult for them to learn any useful trade or occupation by which to earn a livelihood.³

2804. Where a boy about fourteen years old was employed to feed a cotton-seed oil mill by placing cakes in a hopper, which were crushed by rollers underneath, and he was hardly tall enough to perform the work without standing on an elevation, and a box was provided, which was placed loose on a slippery floor, and while performing his work the box slipped, and in trying to save himself from falling he threw out his hand, which was caught in the machine and injured, it was held that whether he knew, or ought to have known, what caution or care was necessary for him to use while standing on the box performing his work in order to avoid the injuries he received, or appreciated the danger of the failure to use such caution, was a question for the jury.⁴

¹ Kaillen v. Northwestern Bedding Co., 46 Minn. 187, 48 N. W. 779.

³ O'Keefe v. Thorne (Pa.), 16 Atl. 737.

² Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692.

⁴ Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 232, 19 S. W. 600.

2805. Where a boy fourteen years old was put at work at a planing machine, and while at the side piling boards his hand in some manner was thrown back into the knives and injured, it was held that the master was not bound to warn him of patent dangers which are ordinarily incident to the service, and which it may reasonably be expected, under all the circumstances, the employee can see and appreciate; that the rule in this respect was the same as to adults. It was further said that it would be a sad detriment to minors in preparing for future usefulness if they should be precluded from all occupations requiring them to work near or with machinery. Parents who desire the future success and usefulness of their sons may well desire them to have such employment upon the ordinary risks, and of those risks the paternal instincts may be trusted, generally, for a fair estimate.¹

2805a. Where a boy fourteen years old was injured while trying to replace a belt on a pulley while it was in motion, it appearing that the room was dark, that he was a foreigner and was examined through an interpreter, was deficient in memory and was far from being bright, and the testimony was conflicting upon the question of the act being within the line of his duties, it was held that a question was presented for the jury as to his being put at work in a dangerous place without proper instruction.²

2805b. Where a girl fourteen years and eight months old was injured while cleaning the running gear of a mule carriage in the mill of her employer, and it appeared that she had been instructed how to do the work, that she had performed the duty many times in each of the six weeks she had been at work, that the movement of the box which came in contact with her head while kneeling to do the work was open to her observation, that she knew how far the box came and how fast it moved, and that the place she occupied was of her own selection, it was held that she was

¹Fones et al. v. Phillips, 39 Ark. 17.

²Laplane v. Warren Cotton Mills, 165 Mass. 487.

negligent, as a matter of law, in allowing herself to be struck by the box.¹

2806. Where a boy fourteen years old was injured the morning after he was put at work upon a certain machine used for stamping pieces of steel, which was operated by placing the foot upon a treadle, by getting his finger crushed under the die, it was held that the question whether the defendant was negligent in not instructing him how to avoid danger in the use of the machine was for the jury.²

5. Fifteen Years Old.

2807. Where a boy fifteen years old, of ordinary intelligence, after working without instruction for two days upon a machine, and cleaning it daily, upon inserting his hand through an opening and pulling down a hinged apron upon which dirt lodged was injured on the third day, while cleaning the machine, by reason of his hand slipping off the apron and getting caught between the edge of it and the sides of the opening, it was said that he knew at the time the relative positions of the opening and apron; that the latter if pulled down and released would spring back, and what degree of force was necessary to hold the apron down. It was held that he knew all the employer could have told him, and he could not recover from the latter for his injuries because of lack of instruction.³

2808. Where a boy fifteen years old was set at work carrying drills to miners in a mine and he was injured by a piece of loose ore falling upon him, it was held that whether the employer should have informed him of the dangers incident to the work in the mine, and whether he was of sufficient age and experience or had sufficient knowledge upon the subject to comprehend the dangers incident to such employment, were questions that should have been submitted to the jury.⁴

¹ Gardner v. Cohannet Mills, 165 Mass. 507.

² Armstrong v. Forg, 162 Mass. 544, 39 N. E. 190.

³ Coullard v. Tecumseh Mills, 151 Mass. 85.

⁴ Jones v. Florence Mining Co., 66 Wis. 268.

2808a. Where a boy fifteen years of age, with but an hour's experience with machinery, attempted under the direction of his superior to clean out refuse which had accumulated under a rapidly revolving circular saw, and was injured by his hand coming in contact with the saw, and his evidence was to the effect that he did not know that the saw came as close to the floor as it actually did, that to him it appeared there were five inches of space between it and the floor, it was held that whether it was negligence in failing to instruct the boy and give him warning of the danger was properly a question for the jury.¹

2809. An employee fifteen years old was injured by having his arm caught between the rollers of a carding machine which he was assisting to operate. He had been employed in operating it at the time of the injury some four or five days. The only danger was that of getting his hands drawn in between the rollers, if his clothing caught on the wire projections on the rollers, and by contact with cogs at the side of the machine. He had been told to keep his sleeves rolled up while operating the machine, and knew there was liability of his clothing being caught if it came in contact with the rollers. It was said: No duty rests upon the master to notify even a minor of the ordinary risks and dangers of his occupation which the latter actually knows and appreciates, or which are so open and apparent that one of his age and capacity could, under like circumstances, by the exercise of ordinary care, know and appreciate. It is immaterial from whom or how this knowledge is obtained, nor that he did not realize the full magnitude of the danger. It was held that he could not recover.²

6. Sixteen Years Old.

2810. It was held not negligence to employ a boy sixteen years old to work about a dangerous machine, where the boy was at least of average intelligence and knew the machine

¹ *Barg v. Bousfield* (Minn.), 68 N. W. 45.

² *Truntle v. North Star Woolen Mills*, 57 Minn. 52, 58 N. W. 832.

was dangerous; nor could negligence be predicated upon the ground of failure to instruct the boy, where it did not appear he could have been told anything that he did not know.¹

2811. A lad sixteen or seventeen years old has sufficient capacity to appreciate and assume the dangers incident to the position of brakeman.²

2812. A lad sixteen years old has sufficient capacity to appreciate the danger of contact with the knives of a jointing machine located in a shop where he is at work, and assumes the risk of injury therefrom.³

2813. Where a boy sixteen years old was injured by his hand being drawn in between the revolving cylinders upon a machine he was operating, and such was the danger to be guarded against, and it was obvious, it was held he could not recover against the employer for such injuries. It was said that, to show negligence in the defendant, it must appear that the danger was such that the plaintiff would not be presumed to know of it, and that the defendant did not give him information of it.⁴

2813a. The danger of the hand of an operative getting caught between the rollers of a mangle used in a laundry is apparent, and no duty rests upon the employer to give a girl sixteen years of age working therein warning of such danger.⁵

2813b. A boy sixteen years old, of ordinary intelligence, who had experience as a night-clerk in a depot yard for several years, was held to have assumed the ordinary hazards of his employment.⁶

2814. Where a boy sixteen years old was injured while operating a buzz saw by his hand coming in contact therewith, and from experience in other factories he knew the operation of the machine and its practical workings, it was

¹ *Tinkham v. Sawyer et al.*, 153 Mass. 485.

² *Greenwald v. Marquette, H. & O. R. Co.*, 49 Mich. 197.

³ *Palmer v. Harrison*, 57 Mich. 182, 23 N. W. 624.

⁴ *Pratt v. Prouty*, 153 Mass. 333.

⁵ *Jones v. Roberts*, 57 Ill. App. 56.

⁶ *C., B. & Q. R. Co. v. Eggman*, 59 Ill. App. 680.

held that the omission to give him information of the dangerous character of the saw did not make the master liable.¹

2815. Where a boy sixteen years old was put at work with a dangerous machine not in proper condition, though he had some experience in the use of similar machines in good condition, it was held a question for the jury whether warning as to the dangers incident to the use of the machine should have been given him, as well as his capacity to appreciate the dangers of the employment.²

2816. Where a boy sixteen years old had been employed as a workman or helper in a machine-shop, whose duties chiefly were receiving and putting away mouldings as they came from a moulding-machine, and, after working a few months, was ordered to ascend a ladder of great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt, and while so engaged had his arm torn from his body, such work being outside of the scope of his employment and as to which he had no experience, it was said: He was a mere youth, without experience and not familiar with machinery, and was not presumed to know the peril of the undertaking. Not being able to judge for himself, he had a right to rely upon the judgment of his superior. It was held that the company was liable, upon the ground that the action of the foreman was rash and inexcusable in ordering the boy into such a place of danger, and that the risk was not assumed.³

2817. A boy sixteen years old was killed while operating an elevator. His experience was that he commenced running it on Monday and was killed the following Friday, and he had occasionally operated it before, and also one for another party. The statute required that the elevator should have been guarded, which was not done. It appeared the check-line was very close to the cable and the chain

¹ Ogley v. Miles, 139 N. Y. 458.

³ Railroad Co. v. Fort, 17 Wall.

² Chicago Anderson Pressed 553.

Brick Co. v. Reinneiger, 140 Ill. 334,
29 N. E. 1106.

near the elevator, and the reasonable inference from all the facts was that through inadvertence he took hold of the cable instead of the check-line, and was jammed up against the ceiling.

The jury having found that the elevator was not a reasonably safe appliance as respected the person employed to operate it, that the defendant was guilty of negligence in permitting or causing the elevator to be used in its then dangerous condition, and that the boy was not of sufficient age and experience to comprehend the danger of operating the elevator, it was held that the verdict against the defendant would not be disturbed.¹

2818. It was said in reference to a boy sixteen years old, injured while working as a helper to one in charge of a drilling-machine, in falling from an icy ledge in defendant's quarry while obeying the order of his superior, that there is a class of cases in which the master is not relieved from liability for injuries to his servant who is required to perform dangerous work, although the danger is obvious and warning and instruction have been given, as when the servant is so young and inexperienced as not to be able to comprehend and guard against the danger to which he is exposed. A master would have no right to set such a servant at such work, and he would do so at his peril. But this case is not of that class, for the testimony does not tend to show that the intestate was any such servant. In the absence of anything to show the contrary, it must be assumed that he had the intelligence and understanding that boys of his age usually have.²

2818a. A boy sixteen years old, employed as oiler in the defendant's mill, was injured while attending to a hot-box by his hand getting caught in an unboxed gear. It appeared from the evidence that he was usually bright and intelligent about machinery, having been employed about mills for four summers and as an oiler several months. It also

¹Thompson v. Johnston Bros. Co.,
86 Wis. 576.

²Williamson v. Sheldon Marble
Co., 66 Vt. 427, 29 Atl. 669.

appeared that his work was done at night; that ordinarily he oiled the machinery when not in motion; that the box in question was just within his reach while standing on tip-toe and steadying himself on the bridge-tree with one hand while oiling with the other. It was held it could not be said as a matter of law that the plaintiff, in view of his age, knew and appreciated the danger.¹

7. Seventeen Years Old.

2819. Where a boy seventeen years old had worked a machine for two weeks, and upon one substantially the same, except the distance between the rolls and cylinder was less than the one which caused him injury, for six months, and he was injured by his fingers getting caught between the rolls and cylinder, it was held that failure to instruct him as to the risks of his employment did not constitute negligence.²

2820. Where a boy seventeen years old was working in a foundry, who had been thus employed for some months, a part of the time near a revolving shaft provided with a set-screw which caught his clothing as he attempted to step over it or go by it in executing a command of his superior, and it appeared it was in plain sight, though he testified he had not observed it before, it was held that a jury were justified in finding that the danger was not obvious to a person of his age of ordinary intelligence and prudence, and that in the absence of warning the master was liable.³

2821. An employee was seventeen years and ten months old when he entered the employment of the defendant as brakeman. It did not appear that it had any knowledge of his age, or that because of his appearance it was put upon inquiry as to his age. Seven months thereafter he was injured while in such service. It was held there was no rea-

¹ Kucera v. Merrill Lumber Co.,
91 Wis. 637.

² Crowley v. Pacific Mills, 148
Mass. 228.

³ Dowling v. Allen, 102 Mo. 213.

son for charging the company with negligence in employing him while he was so young, and in requiring him to perform the ordinary duties of a brakeman after a seven months' experience in such service.¹

2822. It was held that the question was properly presented to the jury whether the employer was negligent in failing to give a boy seventeen years old, without experience, warning of the dangers incident to the use of a buzz-saw.²

2823. A boy seventeen years old who has had experience around machinery cannot recover from his employer for an injury caused by the fact that his shirt, being loose, was caught in a horizontal revolving shaft or windlass while he was bending over it to unfasten a bucket, and so drawn around it; the rule being that a minor servant old enough and sensible enough to use his eyes and to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly, acts at his own peril in failing so to do.³

2824. Where a lad seventeen years old, not very bright, on the first day of his work jumped from a hand-car upon the approach of a freight train and was injured, and it was evident he jumped through fear when in fact there was no danger, it was held that he could not recover — that the rule as to instruction of an inexperienced servant did not apply; that if he became dizzy or in fear, it was a result the master had no right to anticipate.⁴

2825. Where a lad seventeen years old, employed as a brakeman, was injured by reason of the parting of a brake-chain, it was said that the fact that the plaintiff was a minor did not affect the question of the company's liability. If a minor engages to work, the risks of the business are incident to the work. He cannot claim on account of infancy to be relieved from the consequences of such risks. He might as

¹ Youll v. Sioux City & Pacific R. Co., 66 Iowa, 346.

³ Kelly v. Barber Asphalt Co., 93 Ky. 363, 20 S. W. 271.

² Smith v. Irwin, 51 N. J. L. 507.

⁴ Briggs v. Newport News & M. V. Co. (Ky.), 24 S. W. 1069.

See Mackin v. Alaska Refrigerator Co., 100 Mich. 276, 59 N. W. 999.

well claim to enforce the contract for his wages without performing any service. If a child of unsuitable age should be employed in a hazardous business or exposed to unsuitable risks, a different question might be presented. Here no question is made but that the plaintiff was competent for the service which he was employed to render, and no negligence is imputed to the defendant for employing him on that account.¹

2826. Where a boy seventeen years and three months old was injured by his hand coming in contact with a circular saw he was operating, caused by a log rising upwards as he was removing it, and it appeared he had worked in a mill when twelve years old, and in the defendant's mill for two years as a spare hand, and in the room where injured for four months, and had operated the saw for a day and a half, it was said that the plaintiff was of sufficient age and experience to understand and appreciate all obvious dangers of his work. It was held, however, that the fact that logs might thus rise upon the saw might be an obscure danger not obvious to one without experience, and whether he should have been instructed as to it was a question for the jury.²

2827. It was held that whether a lad seventeen years old employed as a brakeman should have been instructed in the duties of coupling cars was a question for the jury.³

2828. To pile lumber on a car in an ordinary manner is to do work of common laborers, and involves no greater hazard than ordinary manual labor. It requires no skill or antecedent training, and therefore a youth of seventeen years is not unduly exposed by reason merely of being left uninstructed in the mode of doing the work or unwarned of the danger. In the absence of evidence to the contrary he will be presumed to have sufficient capacity to appreciate the danger from the lumber falling.⁴

¹ De Graff v. N. Y. & H. R. R. Co.,
76 N. Y. 125.

² Hanson v. Ludlow Mfg. Co., 162
Mass. 187, 88 N. E. 363.

³ Atlanta & W. P. R. Co. v. Smith,
94 Ga. 107, 20 S. E. 763.

⁴ Sims v. East & West R. Co. of
Alabama, 84 Ga. 152, 10 S. E. 543.

8. Eighteen Years Old.

2829. Failure to instruct a boy eighteen years old how to remove pieces of wood from a buzz-saw was held not to be negligence where at most he could only have been told to keep his hands off the knives or he would get hurt.¹

2830. A brakeman eighteen years old, who had been engaged in such employment for three months prior to receiving injuries by reason of the use of a defective lantern in his custody and keeping, cannot be said to be of such tender years as to be without the discretion necessary to a proper understanding and appreciation of the dangers attendant upon such defect.²

2831. It was held that an employee eighteen years old understood and appreciated the danger of cleaning gears in motion under the conditions of the use of an automatic gate or covering.³

2832. It was said in substance that any boy of twelve years would know that his hands would be injured if thrust between the cogs, but it is evident that knowledge of the probable results of the insertion of his hand, and appreciation of the risk or possibility that his hand might be accidentally drawn between the wheels, are two entirely different things.

This was said where a boy eighteen years old was injured while making the effort to oil a machine in a paper mill, and it appeared he had worked in another mill for two years and had frequently oiled a machine of the same character and used for the same purpose, but differing from the one causing him injury, only that the former was a single-decker and the latter a double-decker. That in each the danger was from revolving cogs in plain sight. It was held that whether the master should have warned him of the dangers to which he was exposed was a question for the jury.⁴

¹ *Mackin v. Alaska Refrigerator Co.*, 100 Mich. 276, 59 N. W. 999.

³ *Brady v. Ludlow Mfg. Co.*, 154 Mass. 468.

² *Pennsylvania Co. v. Congdon*, 134 Ind. 226.

⁴ *Chopin v. Badger Paper Co.*, 83 Wis. 192. *Contra*, *Crowley v. Pa-*

2833. It was said in reference to a lad eighteen years old, that though he may have known that service about unblocked rails was attended with danger, yet such knowledge did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was a question of fact; and if the jury believed that the deceased, by reason of his youth and inexperience, did not know of or appreciate the danger incident to service about unblocked rails, and he had been exposed to the danger therefrom without warning him of it, they should have found that the risk was not one assumed by him in entering the service.¹

2834. Where a lad eighteen years old was injured while in the attempt to start an engine from off the center by means of a bar, and when the engine started he was thrown into some machinery, and it was alleged that he was inexperienced, and that the person in charge of the engine negligently opened or left open the valve by which a full head of steam was on the engine, it was held that such conditions justified a verdict for the plaintiff.²

2835. Where a lad eighteen years old was injured in falling from a narrow timber used as a bridge across a deep cut upon which he was wheeling dirt, his fall being caused by the barrow running off the timber, and it appeared his barrow was somewhat defective, in that it did not run true upon the axle, which he knew, it was said: The plaintiff, though an infant in years, was a boy of at least average intelligence and experience. He could not fail to know that by natural law a hurt is the consequence of a fall; nor could he fail to discern and appreciate the danger of the employment in which he was engaged. There was no element of the danger that a bright boy of eighteen could fail to appre-

cific Mills, 148 Mass. 228; Mackin v. Alaska Refrigerator Co., 100 Mich. 276, 58 N. W. 999; Prentiss v. Kent Mfg. Co., 63 Mich. 478; Atlas Engine Works v. Randall, 100 Ind. 293.

¹ Davis v. St. L., I. M. & S. R. Co., 53 Ark. 117, 13 S. W. 801.

² Gartside Coal Co. v. Turk, 147 Ill. 120, 35 N. E. 467.

hend. It was not needful that he be warned of dangers which were obvious and which he understood. No warning could make them more palpable to him.¹

2836. It is the duty of an employer to inform an inexperienced servant of dangers ordinarily incident to the service, and if he fails therein and the employee has no opportunity to learn of them, the latter will not be held to assume risks not obvious to one of his age, experience and judgment. Hence, where a young man eighteen years of age, large for his age and of average intelligence, was employed by the defendant to assist in putting logs on a skidway at the foot of a steep hill, to accomplish which the logs were rolled down the hill, the employees keeping them straight by means of cant-hooks, and while engaged in this work he was caught by a rolling log and killed, no one witnessing the accident, and there was evidence which, in the opinion of the court, tended to show that the employment had elements of danger such as were not open and obvious to the inexperienced, but such as, in the absence of instruction, could be learned by experience alone, and that he was inexperienced and had not been warned but had been cautioned, it was held that the question of defendant's liability was for the jury.²

2837. Where a young man eighteen years old was employed to handle wood to be sawed on defendant's saws, and on the day of the accident was ordered by the superintendent to run one of the saws, and while so acting was injured, and it appeared that on other occasions he acted as sawyer, that he knew the saw was defective, and that the method was simple and easy, it was held that judgment for plaintiff be reversed, without the award of a new trial. It was said it was but reasonable and fair to presume, with his opportunities for learning, that he understood the risk of using the saw, and knew that there was necessity for the exercise of

¹ *Casey v. C., St. P., M. & O. R. Co.*, 90 Wis. 113, 62 N. W. 624.

² *Wolski v. Knapp, Stout & Co. Company*, 90 Wis. 178, 63 N. W. 87.

care to prevent being injured, to say nothing of his right to refuse to do work for which he was not employed.¹

9. Nineteen Years Old.

2838. Where an employee nineteen years of age was injured while operating a split saw, and it appeared that he had been in the defendant's employ three years and was put at work on all kinds of machinery, had been employed in the room where the split saw was located and had worked at it several days before he was injured, it was held he could not hold the defendant liable on the ground that he was inexperienced, and the defendant should have warned him of the danger. The fact that the saw exposed the servant to a peculiar danger which could be foreseen only by practical experience and instruction could not make the defendant liable if that source of danger was not the cause of the injury.²

2839. An employee nineteen years old employed upon a construction train in delivering ties upon an unfinished track, injured by the derailing of a car, cannot be said to be void of sufficient discretion to comprehend the dangers of the business in which he was engaged.³

2840. A boy nineteen years old of ordinary intelligence must be held to understand the danger of getting his hand caught between the cross-beam of an elevator and a floor while operating the elevator.⁴

2841. A boy nineteen years old, unable to speak the English language, was held to have appreciated the danger and risk from getting his hand caught in an appliance he was operating, which revolved at the rate of twelve hundred revolutions a minute.⁵

¹ Michael v. Stanley, 75 Md. 464, 23 Atl. 1094.

² Prentiss v. Kent Mfg. Co., 63 Mich. 478.

³ Evansville, etc. R. Co. v. Henderson, 134 Ind. 636.

⁴ Rood v. Lawrence Mfg. Co., 155 Mass. 590.

⁵ De Souza v. Stafford Mills, 155 Mass. 476.

2842. Where a young man nineteen years old was set at work in a saw-mill close to uncovered gearing in plain sight, so that if he had looked he could have seen it, it was held to have been the duty of the employer to have instructed him as to the particular danger from that source; and not having done so, and the employee having been injured by contact with such gearing five days after the commencement of his service, the employer was liable.¹

2843. Where an apprentice nineteen years old working in a boiler shop was set by the foreman to straighten out pieces of old smoke-stacks, which was done by running them through the machine, in doing which his fingers were caught in the rollers of the machine and crushed; and it appeared he had worked in the shop for two years and two months, and upon the machine for one month; that the character of the machine was two rollers, one above the other and in plain sight, it was said: This danger was open to the senses as apparent as the danger to one who should lie down on a railroad track in front of a locomotive. No one of the commonest capacity could see the machine work and see what it would do with a plate of iron without fully appreciating the danger and knowing that if he would avoid injury he must take care not to get his hands between the rollers. Knowledge of the danger was forced upon him by his senses. No amount of notice or instruction could have better informed him. The defendant had a right to assume he knew it.²

2844. Where a young man nineteen years old, with considerable experience as a brakeman, was injured while jumping from a moving train, in missing his footing and one foot being caught under the wheels, it was held that whether he had sufficient capacity and experience to appreciate the danger was a question for the jury. It was said that the court did not agree with those courts which hold that at the age of fourteen a minor is presumed to assume the risks of a

¹ *Nadau v. White River Lumber Co.*, 76 Wis. 120.

² *Berger v. St. Paul, M. & M. R. Co.*, 39 Minn. 78, 38 N. W. 814.

dangerous employment the same as an adult, but rather that under the age of twenty-one the question of his capacity is for the jury.¹

2845. Where a brakeman nineteen years old was injured while coupling cars, one with a Miller hook and the other with the ordinary draw-bar, by the draw-bars passing each other, and it appeared that he had been employed in the yard for six weeks, and the proof tended to show that he had no actual experience in making such couplings, and that this fact together with his minority was known to his superior, who had authority to employ him and who put him to work, it was held that the evidence was sufficient to justify a finding that the defendant was negligent, notwithstanding the employee was informed that the danger of service in the yard was greater than on the road, and the danger of coupling the Miller hook with the ordinary draw-head was explained to him.²

2846. A boy nineteen years old was held to have sufficient capacity and discretion to appreciate the dangers connected with putting a hood in its place in front of the knives upon a machine. He had been employed for about three weeks in taking lumber from the machine. It was said: He had full opportunity to observe the handling of the hood, and it was not negligence to ask him to place it upon the machine without instructions, especially as he asked for none. If the operation was especially dangerous, the danger was obvious and he was not bound to obey the order, and in doing this he assumed the risk.³

2847. Where a young man nineteen years old, employed as one of a crew of laborers to work with a construction train, was commanded by the conductor to set brakes, a duty outside the work he was employed to do, and in obedience to such order attempted to do the act and was in-

¹ *Texas & Pacific R. Co. v. Brick*, Tex. App. 122, 20 S. W. 1014, 23 S. 83 Tex. 598, 20 S. W. 511.

² *Missouri Pac. R. Co. v. King*, 2 ³ *Crown v. Orr et al.*, 140 N. Y. 450.

jured, and it appeared he was inexperienced in such work, it was held that the risk was not one assumed by him.

(From late expressions of the court, the ground of the decision was the youth and inexperience of the employee.)¹

10. Twenty Years Old.

2848. Infancy of an employee does not of itself give him a cause of action against his employer for setting him at work, if it appears he was of average intelligence, that his duties were explained to him when he entered upon the employment, and that he had in mind at the time of injury its dangers and the purpose to avoid them.

This was said in reference to a young man twenty years old who was injured by getting his foot caught in an unblocked frog. It was held that he appreciated the danger, and therefore assumed the risk.²

2848a. The danger of the hand of an operative, engaged in feeding grain into crushers which consist of two cylinders revolving inwards, in plain sight, getting caught, is apparent, and no duty rests upon the employer to give such an operative of the age of twenty years instruction or warning as to the consequences of his hand being caught between the cylinders.³

11. Obvious Dangers.

2849. Minor servants are held to assume by their contract of employment those ordinary risks of the service which are obvious to them or have been pointed out in a manner suited to the comprehension of their youth and inexperience. They cannot ignore the duties of common prudence, or the instructions of their superiors, to guard themselves from apparent dangers, and charge the consequences upon their employers.

¹ C. & N. W. R. Co. v. Bayfield,
37 Mich. 204.

³ Nugent v. Kaufmann Milling
Co., 131 Mo. 241, 33 S. W. 428.

² McGinnis v. Canada Sou. R. Co.,
49 Mich. 466.

This was said where a youth sixteen years old was injured in attempting to place a belt on a wheel. He had run the machine for two months; was told to be careful and call for assistance when it was necessary to adjust the belt; at the time of his injury he neglected to call for assistance, though at hand. It was held that he could not recover.¹

2850. The rule as to warning and instruction of young persons was stated to be the same as to adults, that the master is not required to explain patent dangers at all, which are ordinarily incident to the service, and which, it may reasonably be expected under all the circumstances, the particular employee can see and appreciate.²

2851. Where a minor is familiar with a machine, and its character and operation is obvious, and he is aware of and fully appreciates the danger to be apprehended from it, he takes upon himself the risk incident to the employment, the same as a person of mature age. This was said in reference to a boy assisting in the operation of a machine.³

2852. An employer is under no obligation to warn an employee of dangers which are obvious, nor to instruct him in matters which he may fairly be presumed to understand; nor is it the duty of the master to admonish the servant to be careful when the servant well knows his danger and the importance of using care to avoid it. This was said in reference to a boy twelve years old injured by contact with cogs.⁴

2853. Bumpers, style of.—A minor employee engaged as a brakeman, who had been in the service three days when he was injured, in coupling cars, by his hand getting crushed between the dead-woods, was held to the consequences of what he knew or ought to have known of the danger as though he were an adult.⁵

2854. Where a minor of immature judgment and without experience was employed as a brakeman upon a freight

¹ *Beckham v. Hillier*, 47 N. J. L. 12.

² *Fones et al. v. Phillips*, 39 Ark. 17.

³ *Buckley v. G. P. & R. M. Co.*, 113 N. Y. 540.

⁴ *Ciriack v. Merchants' Woolen Mills*, 151 Mass. 152.

⁵ *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

train and was ignorant of the difference between double and single dead-woods upon cars, and of the hazards attending the act of coupling cars constructed with the former, of which fact the company knew or might have known, and was without instruction ordered by the conductor to couple cars furnished with double dead-woods, instead of single dead-woods ordinarily in use by the company, and in attempting to do so received an injury, it was held the company was liable.¹

2855. Whether it was negligence to employ a minor and direct him to couple cars without giving him proper instructions, and whether the use of cars, one with a Miller platform and the other without, to be coupled, was negligence under the particular circumstances, was held a question for the jury.²

2856. Gearing and cogs exposed.—It was said, however, in reference to a boy less than fourteen years old injured by contact with cogs in a machine near the one he was operating, and which was in plain sight, when it appeared he was inexperienced and had only worked one day prior to his injury, that the jury were justified in finding that he should have been instructed as to the dangers surrounding him in his employment, even though the dangers were obvious to an older person.³

2857. Yet where a boy sixteen years old was injured by his hand being drawn in between revolving cylinders upon a machine he was operating, and such was the danger to be guarded against, and it was open and obvious, it was held he could not recover.⁴

2858. Lumber falling while handling.—Where a minor working with his father, and hired by him to the defendant to transfer lumber from one car to another, was injured by lumber falling upon him, and the court left it to the jury

¹ Louisville, N. A. etc. R. Co. v. Frawley, 110 Ind. 18.

³ Coombs v. New Bedford Cordage Co., 102 Mass. 572.

² Pennsylvania Co. v. Long, 94 Ind. 250.

⁴ Pratt v. Prouty, 153 Mass. 333.

to determine his capacity to appreciate the danger and whether he should have been instructed, it was held that the business was not specially hazardous, and he would be presumed to know its risks, especially as he had worked at it once before, and the employer might assume that his father had given what instructions he needed.¹

2859. Narrow platform.—Where a boy eighteen years old, while employed in loading dirt upon a flat-car by means of a wheelbarrow which he was required to wheel over a narrow timber which bridged a deep cut, was injured by falling from the timber, caused by his barrow running off, and it appeared that the barrow was somewhat defective in that it did not run true upon the axle, but plaintiff knew of this defect, it was held that there was no ground for recovery; that the danger was obvious to him, and a verdict should have been directed for the defendant.²

2860. Set-screw.—Where a boy seventeen years old was injured while performing a duty at the request of his superior, who had control over him, caused by his clothing getting caught in a set-screw upon a revolving shaft, and the question was as to the master's duty to apprise him of the danger from such shaft, it was said: If there are concealed dangers known to the employer and unknown to the employee, it is the duty of the employer to notify the servant of their existence. We think the doctrine equally well settled, although the machinery or that part of it complained of as especially dangerous is visible; yet, if by reason of the youth and inexperience of the servant he is not aware of the danger to which he is exposed in operating it or approaching near it, it is the duty of the master to apprise him of the danger if known to him.³

2860a. Steam-pipes laid on kitchen floor.—A girl sixteen years of age, of reasonable intelligence, working as a

¹ East & West R. Co. v. Sims, 80 Ga. 807, 6 S. E. 595.

³ Dowling v. Allen & Co., 74 Mo. 13.

² Casey v. C., St. P., M. & O. R. Co., 90 Wis. 113, 62 N. W. 624.

servant in a kitchen, tripped upon steam pipes laid in the kitchen, which were covered, being raised about two inches above the floor, and fell, causing her injury. She knew that the obstruction was there, and had passed over it for several months before the accident. It was held that she had assumed the risk.¹

K. Character and Extent of the Warning and Instruction to be Given to Employees.

2861. The instruction and warning that should be given a young employee must be accompanied with such explanation as will enable him to understand it. This was said where there was a tank near where a boy eleven years old was performing his work, and the claim on the part of the defendant was that the boy was told not to place his files there, which order he did not respect.

It was further said: It is not to be expected that a child of eleven years will bear in mind and always follow a mere direction to put his work in any particular place when he knows no reason why it may not be put in another place near by as well.²

2862. Where a boy twelve years old was injured by contact with revolving cogs upon a machine while he was passing near it obeying an order of his superior, it was said: The instruction which he was entitled to receive was concerning the danger from revolving cogs. There was no peculiar or secret danger. Anybody seeing the machines in motion would soon become aware of the danger arising from contact with them. The duty of the defendant would be sufficiently discharged by pointing out the situation of the machine and the rapid revolution of the wheels while in motion, and explaining the probable effect of touching them. The master is only bound to give such instructions as are reasonably necessary in order to enable the servant to un-

¹ Herold v. Pfister (Wis.), 66 N. W. 355.

² Honlahan v. New American File Co., 17 R. I. 141.

derstand the perils to which he is exposed by reason of his employment.¹

2863. Upon a second appeal it was further said: An employer is under no obligation to warn an employee of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed to understand. Nor is it the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so the fault is his and not the master's. When the work of the servant exposes him to danger of which he is ignorant, and which from youth and inexperience he is manifestly incapable of comprehending without assistance, it is the duty of the master, if he knows or ought to know of it, to give him such warning and instructions as are necessary for his safety. In determining the master's duty in such a case, the inquiry is, what instruction does the servant appear to need? Is there reason to believe him ignorant of anything which for his protection he ought to know, or is he incapable of appreciating the risks from what he sees around him? In the absence of anything to show to the contrary, the master has a right to assume that he knows those facts of common experience with which ordinary persons of his age and appearance are familiar. In hiring a boy twelve years of age and apparently of average intelligence, an employer is not called upon to tell him if he holds his hand in the fire it will be burned, or strike it with a sharp instrument it will be cut, or thrust it between the teeth of revolving cogs in the gearing of a mill it will be crushed.²

2864. Where a boy less than fourteen years old was injured by contact with revolving cogs of a machine located near the machine he was operating, it was said: The notice which the defendants were bound to give the plaintiff must

¹ *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182.

² *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152.

be such as to enable a person of his youth and inexperience in the business to intelligently appreciate the nature of the danger attending its performance. The obligation of the defendant would not necessarily be discharged by merely informing the boy that employment in a particular place or with a machine or in a building or room in which he was set at work was dangerous.¹

2864a. Where a boy fifteen years old, employed at a machine with rapidly revolving cogs, was repeatedly warned of the danger and told that his fingers would be cut off if caught therein, it was not required that the instruction and warning should go to the extent of pointing out wherein the danger consisted, as it was apparent, nor how his hand would be injured if caught.²

2865. Where a young man, inexperienced in the work in a mill which he was required to do, was instructed in the use of the machine and its perils by another employee selected for such purpose, and such instructor and employee believed that the instruction had continued sufficiently long so that the employee comprehended such use and peril, it was said: If such instructions were given as would justify the defendant in believing that he had done his duty by the plaintiff, and such as most men would do under like circumstances, that is enough.³

2866. Where a young boy was injured by his hands coming in contact with revolving knives of a machine which he was operating, it was held that he was fully aware of the danger to be apprehended from contact with knives; but as there was proof that the motion of the knives caused a strong suction which might have drawn them in, it became a proper question for the jury, under proper instructions, to determine whether such was the fact, as well as whether he was aware of it, and, if it was a fact, whether it was the duty of the employer to see that he was properly instructed.⁴

¹ Coombs v. New Bedford Cordage Co., 102 Mass. 572.

² Bibb Mfg. Co. v. Taylor, 95 Ga. 415, 23 S. E. 188.

³ Foster v. Pusey, 8 Houst. (Del.) 168, 14 Atl. 545.

⁴ Bohn Mfg. Co. v. Erickson et al., 55 Fed. 943 (C. C. A.).

2867. It was said in regard to a young boy, that if the business is one with which he is not familiar, he has a right to expect that its dangers will be pointed out to him and that he will be instructed in those things necessary for him to know in order to his own safety.¹

2868. The duty devolves upon the master, before putting a servant known to him to be unskilled in charge of dangerous machinery, with the operation of which he is not acquainted, to instruct and qualify him for such new duty. If for the purpose of instruction he selects another servant in his employ, the latter must be not simply as competent as the master, but absolutely competent. If he is incompetent or negligent while performing the duty of instruction, or if he discontinue his instructions before completion, and in consequence the promoted servant is injured, the master is liable.

This rule was stated and applied where one was employed to run and operate an elevator.²

2869. Where a servant was aware of the existence of a well in a basement where he was at work, filled with water to within a few inches of the surface, but did not know it was used for the purpose of catching the drippings of water formed by the condensation of steam in the engine which stood near by, and, having occasion to go near the well, he accidentally fell in and was scalded, it was held that it was an injury of which he assumed the risk, and that it was immaterial that he did not know the precise extent or character of the injury which he would sustain if he fell into the well.³

2870. It was held, where an employee working near a chute in a mill where his duties required him at times to step over a rapidly-revolving shaft upon which were projecting screws, that, notwithstanding the shaft was in plain

¹ *Rummel v. Dilworth*, 131 Pa. St. 509. 161 Mass. 426. See, also, *Rooney v. Sewall*, etc. *Cordage Co.*, 161 Mass.

² *Brennan v. Gordon*, 118 N. Y. 489. 153; *Downey v. Sawyer*, 157 Mass. 418.

³ *Feely v. Pearson Cordage Co.*,

sight and the danger therefrom obvious, yet whether he should have been warned of the danger from the projecting screws was, under the circumstances, a question for the jury.¹

2871. It is manifestly impossible for an employer to anticipate in advance every possible risk or accident which may happen in the use of a given machine, and if he gives such general instructions and cautions as will enable the employee by the use of his intelligence to comprehend the dangers which threaten him in his work, he must be held to have discharged his duty.²

2872. Where a young man nineteen years old, known to the master to be inexperienced as a brakeman, was injured in the attempt to mount a moving car on the first day of his employment, and the contention was that he should have been instructed as to the performance of such act, it was said that the defendant could not impart to him that which could only be acquired by practice. The plaintiff did know from observation the manner of mounting moving cars and of the dangers attending it; therefore it was not required that the defendant should instruct or warn him with respect thereto.³

2873. Simply warning a servant of danger does not generally excuse the master from pointing out the particular danger of the employment and to so instruct him as to enable him to avoid such danger. Though an ignorant and inexperienced man may frequently be warned and cautioned that he is encountering great peril and will be hurt if he is not careful, yet, unless the particular source of danger is pointed out to him, and the manner of avoiding it explained, the warning will not benefit him materially.

This was said where an inexperienced employee was injured while working in connection with a machine for mak-

¹ *Roth v. Northern Pac. Lumbering Co.*, 18 Oreg. 205, 22 Pac. 842.

³ *Yeager v. Bur., C. R. & N. P. Co.* (Iowa), 61 N. W. 215.

² *Thompson v. Edward P. Allis Co.*, 89 Wis. 523.

ing strawboard, by getting his hand drawn in between the rollers while in the act of remedying a break in strawboard passing through such rollers, the rollers being in plain sight.¹

2874. Where an employee on the day of his entry into the service was killed by contact with a pile of stone near the track while ascending a car, and it appeared from the testimony of the conductor that he had warned him to look out for a pile of stone along the track,—that it was so close it would not clear him,—it was said: It is not clear from the evidence that the conductor informed him so particularly as to the location of the stone-pile that the deceased must be deemed to have known that it was located on the side-track, but notice of the precise nature of this danger was involved in the warning. If such notice was given he must have understood the nature and extent of the peril, and that this danger was one which he was likely to encounter as a brakeman on this line of less than four miles of road. He must be regarded as having assumed the risk.²

L. *Peculiar or Special Perils.*

2875. It may frequently happen that the dangers of a particular position or mode of doing work are great and are apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience or general want of capacity, may fail to appreciate them. It would be a breach of duty on the part of the master to expose a servant of this character, even with his own consent, to such dangers unless with instructions and cautions sufficient to enable him to comprehend them and to do his work safely with proper care on his part.³

2875a. An employee of the defendant who had no special skill or experience as a machinist was put at work tightening the bolts of a gas generator. There was evidence to

¹American Strawboard Co. v. Faust, 11 Ind. App. 638, 39 N. E. 89. ³Sullivan v. India Mfg. Co., 113 Mass. 396; American Strawboard

²Smith v. Winona & St. P. R. Co. v. Faust, 11 Ind. App. 638, 39 N. E. 891.
Co., 42 Minn. 87, 43 N. W. 968.

the effect that to do such work properly and safely when gas was being generated required skill and experience,—that the nuts on the bolts should be moved slightly, one at a time, so as to make the strain practically even. It was claimed that an employee who was injured by the explosion of the generator while so engaged should have been instructed as to the manner of doing the work, and that the failure to so instruct him, whereby he tightened the bolts in an improper manner, was the cause of the explosion. It was held that a verdict for the plaintiff would not be disturbed. The fact that the cause of the accident was unforeseen does not relieve the master from liability for the employment of unskilled and inexperienced men to perform a dangerous service without giving them instruction as to the manner of doing the work and warning of the danger.¹

2876. If the nature of the work be hazardous, involving the necessity of great care and caution on the part of the servant for his own protection against injury, the presumption of law is that he fully understands the nature of the work, and that his compensation was fixed with reference to the risks and perils of the service undertaken by him. The master, however, is not justified in knowingly or negligently exposing the servant to any extraordinary or unreasonable peril in the course of the employment against which the servant, from want of knowledge, skill or physical ability, could not by the use of ordinary care and prudence under the circumstances of the case guard himself.

The foregoing was said where one, while engaged as a common laborer about the construction of a heavy iron bridge, was injured by the incautious use of a short plank on greased rails instead of a plank of proper length resting solidly on the timbers of the scaffolding or framework of the bridge.²

2877. Where a railroad company constructed its turn-table close to a track upon which engines were accustomed to

¹ Ryan v. Los Angeles I. & C. S. Co., 112 Cal. 244.

² State to use of Hamlin v. Malster & Reany, 57 Md. 287.

move, and subsequently the company put in use larger engines, which, when being turned upon the table, were liable to be struck by passing engines, and while one such was being turned by an employee by means of a crank provided for such purpose it was struck by a passing engine, causing the motion of the crank to be reversed and fly backward, striking such employee with great force, causing him injury, it was said: The testimony shows that he knew when a large engine was on the table, headed toward the track, its pilot projected over one rail of the track, and it may be inferred that he knew there was liability that an engine on the track might collide with one on the table, and yet he may have been ignorant that such a collision would probably expose him to danger of personal injury, and it cannot be said he was chargeable with negligence in reference to a matter of which he was ignorant.

The rule of law applicable to such a case is, that where there are risks of a special nature in an employment, of which the employee is not cognizant, or which are not patent in the work, it is the duty of the employer specially to notify him of such risks, and on failure to give such notice, if he is hurt by exposure to such risks, he is entitled to recover from the employer in all cases where the employer either was cognizant or ought to have been cognizant of the risks.

It was held that the question was for the jury.¹

2878. Attack while working, danger from.—If the employer has knowledge that the particular employment is from extraneous causes hazardous to a degree beyond what it fairly imports or is understood by the employment to be, he is bound to inform the employee of the fact, and if he fails to do so he is liable in damages for injuries sustained by such employee from such causes. The employee is entitled to all the information the employer may possess with regard to the danger arising from extraneous causes, to enable him to determine for himself whether at the proffered compensation he will assume the risk and incur the hazard.

¹ Lake Shore & M. S. R. Co. v. Fitzpatrick, 31 Ohio St. 479.

This rule was applied where the defendant employed a carpenter to go with him to perform work upon certain premises. The defendant knew that other parties claimed to be in possession of the land and had erected a fence, and he had good reason to believe that any interference with such fence would be forcibly resisted. Such employee was wounded by being shot with a rifle ball. It was held that the employer's duty required that he should have given the plaintiff such information as he possessed and made him acquainted with what he believed might be the action of such other parties.¹

2879. Where the servant of a corporation does acts in obedience to its orders which are in violation of an injunction restraining such acts, or which amount to a trespass, and such servant has no notice of the injunction or the validity or wrongfulness of such acts, or of any liability or danger of arrest likely to be incurred in the performance thereof, and such liability and threatened danger are known to his principal but concealed from him, the principal is bound to indemnify him for the damages suffered by him as a natural result of the acts done in obedience to the orders of his superior, and such liability does not depend upon the ultimate determination of the question as to whether the alleged trespass by or upon the servant is or is not legally justifiable, or as to the legality or propriety of the issuance of the injunction.²

2880. Board riding saw.—Where a common laborer about a mill was set at work to feed a circular saw, and was without experience except such as he had from performing such service for three or four days prior to the day when he was injured by a board which fell upon the top of the saw being thrown back, it was held that the danger from such source should have been explained to him or he warned thereof, and the defendant was liable for its omission in that respect.³

¹Baxter v. Roberts, 44 Cal. 187. ³Arizona Lumber & Timber Co.

²Guirney v. St. P., M. & M. R. Co., v. Mooney (Ariz.), 33 Pac. 590.
43 Minn. 496.

2881. Where the plaintiff, an intelligent man nearly twenty-one years of age, had been put at work at a circular saw, after watching a man run through one or two sticks, without asking for or receiving any further instructions, and it appeared he had some experience with saws, having operated the saw in question for ten days before he was hurt, and he had learned that it caused the wood to bend and made it fly back with great force; that the proper method of operation was, when the stick was nearly through, to force it through by following it with another, which he knew; but instead of doing this he was forcing a stick through with his hand, when the piece raised, throwing his hand upon the saw, it was held that he could not recover, and that the defendant was justified in putting him at work at the saw without further instructions in the absence of a request therefor by him, though he had told the defendant he was not an experienced hand.¹

2882. Cutting trolley-wire; rebound of wire.— Where a common laborer was ordered to cut a trolley-wire over defendant's track, a work outside of his employment, and in doing the act, standing on a ladder on top of a car, the wire parted, the rebound throwing him from the car, causing his death, and it appeared he was without experience in such work, it was held that it was for the jury to determine whether the danger was apparent to deceased, though it may have been obvious to one having skill and experience.²

2883. Dynamite, danger from in heated room.— Where the master puts a servant into an employment attended with dangers of a latent character, he is bound to give him information of the incidents of peril in which he is placed if it is not reasonably to be supposed that he understands them. This was said where an employee was injured by the explosion of dynamite in a room where there was a heater, such room being his place of work, which consisted in attaching

¹ *Wilson v. Steel Edge Stamping & Retinning Co.*, 163 Mass. 315, 39 N. E. 1039. ² *Walker v. Lake Shore & M. S. R. Co.* (Mich.), 62 N. W. 1032.

fuse to fulminating caps, and as to which he had only two days' experience.¹

2884. Where a servant, a minor, was injured by the explosion of giant powder which had been furnished him for use, and it appeared that ordinary powder was used when such employee entered the service, but giant powder was substituted afterwards, and the negligence charged was the introducing of the new explosive without informing his superiors or instructing him as to the proper manner of using it, and without advising him fully as to its dangerous character, it was said: Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff to ascertain and make known its properties, and the mode of using it, either to the plaintiff himself or those under whose direction he worked. It was gross negligence to furnish such an article for a laborer's use without giving him the requisite information.²

2884a. It was held to be the duty of a master to warn an inexperienced laborer, set at work with a pick to dig where frozen ground had been blasted, of the danger of unexploded blasts, where he struck an unexploded piece of dynamite with his pick, causing it to explode, whereby he was injured.³

2884b. The removal of unexploded blasts by drilling is in the line of employment of servants whose duties relate to blasting in a quarry. Such an employee assumes the risk from such work done in the ordinary manner.⁴

2885. **Electric wires.**—Where an employee engaged in performing duties as an oiler in a large electric plant was killed by contact with electric wires, which were so arranged upon the floor as to be extra and unnecessarily dangerous, it was said: It was the duty of the company to have known of the dangerous character and condition of the wires. The

¹ Rillston v. Mather et al., 44 Fed. 743.

³ Burke v. Anderson, 69 Fed. 814.

⁴ Miller v. Western Stone Co., 61

² Smith v. Oxford Iron Co., 42 Ill. App. 662.
N. J. L. 467.

law presumes it. In such cases the superior is bound specially to warn the employee of the nature of the danger, and will not be excused, in case of injury, unless he proves that the employee well knew of the danger, and notwithstanding exposed himself willingly and deliberately to it. In this case the great presumption is that the employee was totally unaware of the same, for it cannot for an instant be reasonably supposed that, had he known that by coming in contact with the wires they would have stricken him dead, he would have done so.¹

2885a. An employee of a telegraph company was injured by receiving a strong shock of electricity while he was attaching a telegraph wire upon a pole. It appeared that ordinarily there was no danger from such source, but in the particular instance there were poles to which electric wires were attached, which fact was unknown to the plaintiff. That he, being a stranger, had no knowledge of this additional element of danger. It was held that whether such element of danger was or ought to have been known to or observed by him was a question for the jury.²

2886. Explosive character of hot metal.—Where a laborer slipped and fell while carrying molten metal along a passage-way which was covered with ice, and was injured by the explosion of the metal, caused by its contact with the ice, it was said that as to those dangers which are the subject of common knowledge, or which can readily be seen by common observation, the master is under no obligation to inform the servant, but the servant should have been instructed that the metal was likely to explode by coming in contact with ice, as that was a peculiar danger which he was not presumed to know.³

2887. It was said that the law will not presume that men of ordinary intelligence know the explosive character of hot

¹ Myhan v. Louisiana E. L. & P. Co., 41 La. Ann. 964, 6 So. 799.

² Western Union Tel. Co. v. McMullen (N. J. L.), 33 Atl. 385.

³ Smith v. Peninsular Car Works, 60 Mich. 501; New Albany Forge & Rolling Mill v. Cooper, 131 Ind. 363.

slag when thrown into water; it is doubtful whether many people of education know the force and violence of such an explosion, and therefore an employer is bound to inform his servant of the dangers attending an employment connected with the use of such material.¹

2888. Fumes from manufacture of paris green, poisonous character of.—It was held to be the duty of an employer who put his men at work in the making of paris green, in which poisonous ingredients are used, which are likely to cause injury to one so engaged by inhalation of poisonous fumes, to inform them of the dangerous character of such process and the necessary precautions that should be taken to avoid injury from such source. It was said, however, that the employer is not required to inform them of the particular ingredients of the formula used in its manufacture.²

2889. Fumes from manufacture of demitro benzole, poisonous character of.—Where a common laborer employed on outside work was ordered by the superintendent to do some work in connection with the process of making demitro benzole, which evolved poisonous fumes and which caused him discomfort so that he left the work, whereupon the superintendent assured him the fumes would not hurt him and ordered him to return to his work, and the expert testimony was conflicting as to whether such illness was or could have been produced by such fumes, it appearing he had not been warned of any danger, it was held that the question of defendant's negligence was for the jury.³

2890. Gas-room in factory, danger from fire.—It was held not criminal negligence in a corporation not to give warning to the master machinist employed in the establishment that there was danger of fire in the gas-room, or that there was danger that the walls would fall in case fire oc-

¹McGowan v. La Plata M. & S. Co., 9 Fed. 861.

³Wagner v. H. W. Jayne Chemical Co., 147 Pa. St. 475.

²Fox v. Peninsular White Lead & Color Works, 84 Mich. 676.

curred, it not being alleged that he was ignorant of the danger or of the causes that produced it.¹

2891. Method of work.—Where an employee who had been engaged for defendant in the same work for four and a half years was injured while he was shoveling coal in a shed by a load of coal dumped through a hatchway of the roof falling upon him, and he knew such was the way the work was done but did not know the exact time when it would be done, and he had never been warned as to the time, it was held there was no breach of duty on the part of the defendant.²

2892. Moving machine, liability to fall from manner of construction.—It was held that a mechanic employed by an inventor to move a machine in the latter's presence was entitled to be instructed as to the dangers connected with the act he was required to do, if the inventor knew or ought to have known of the danger and the employee did not know or have reason to know of such danger. (The machine fell from imperfect construction.)³

2893. Steer, vicious habits of.—It was held that it was the duty of an employer to notify his servant of the vicious character and habits of a steer which the servant was directed to assist in placing in a pen, where it appeared the viciousness of the animal was known to such employer and unknown to the workman.⁴

2894. Tendency of saw to throw log upward.—Where the plaintiff was seventeen years old, had worked in a saw-mill when twelve years old, and had been in the defendant's mill as a spare hand for two years, and for four months in the room where he was hurt, and for a day and a half operating the saw in cutting logs, and he was injured while removing a partially cut log by the saw throwing it upward, thus bringing his hand in contact with the saw, it was held

¹Allen v. Augusta Factory, 82 Ga. 76, 8 S. E. 68.

²Flynn v. Campbell et al., 160 Mass. 128.

³Walsh v. Peet Valve Co., 110 Mass. 23.

⁴International & G. N. R. Co. v. Smith (Tex.), 30 S. W. 501.

that whether the tendency of the saw to throw upward any object touching it at the back was such a latent danger as defendant was required to warn plaintiff against was for the jury. It was said: Such source of danger cannot be said to be obvious to one without experience, but is one of those obscure dangers of which an employer should give warning, if he has reason to suppose that a workman who may encounter it in his work does not know of this action of the saw and is ignorant of this particular danger.¹

¹ *Hanson v. Ludlow Mfg. Co.*, 162 Mass. 187, 38 N. E. 363.

CHAPTER XV.

PREMISES OR SAFE PLACE TO WORK.

- A. *Rule*, 2895 et seq.
- B. *Bridges*, 2898 et seq.
- C. *Buildings and Yards*, 2912 et seq.
- D. *Mines, Trenches and Pits*, 2921 et seq.
- E. *Tracks*, 2938 et seq.
 - Character of, 2938 et seq.
 - Condition of, 2945 et seq.
 - 1 *Tracks, Side*, 2950 et seq.
 - Character of, 2950 et seq.
 - Condition of, 2958 et seq.
 - 2. *Culverts*, 2963 et seq.
 - 3. *Obstructions Near*, 2968 et seq.
 - 4. *Structures Near*, 2974 et seq.
- F. *Place Made Unsafe by Act of Fellow-servant*, 2993 et seq.
- G. *Working in Dangerous Place by Direction of One Without Authority*, 3019.
- H. *Offending Servant Acting under Orders of Master*, 3020 et seq.
- I. *When the Work Itself Makes the Place Insecure*, 3022 et seq.
- J. *Clearing Snow from Tracks*, 3036 et seq.
- K. *Fencing Tracks and Erecting Cattle-guards*, 3039 et seq.
- L. *Duty Personal to the Master*, 3051 et seq.
- M. *Notice Required of Defects*, 3058 et seq.
- N. *Notice Presumed*, 3063 et seq.

For cases which relate to unsafe place of work by reason of exposed gearing or dangerous machinery, see APPLIANCES, KIND; SAFEGUARDS AND PRECAUTIONS; MINORS; ASSUMED RISK; INSTRUCTION AND WARNING.

A. *Rule.*

2895. It is the duty of the master to provide and maintain for his servants a reasonably safe place for the doing of their work. This duty is one of the exercise of ordinary care, and is personal to the master.¹

¹ *Bessex v. C. & N. W. R. Co.*, 45 St. P. R. Co., 58 Wis. 319; *Same* Wis. 477; *Hulehan v. G. B. W. & Case*, 68 Wis. 520; *Vandusen v.*

2896. While it is well settled that one who enters upon service for another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-servants, yet, on the other hand, the principle is perfectly established that the employer is under an implied contract with those whom he employs to adopt and maintain suitable instruments and means with which to carry on the business in which he requires their service, and this includes an obligation to provide a safe place in which the servant, being himself in the exercise of ordinary care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment.¹

2897. It was said that the same reasoning which shows that the machinery and other instruments of labor should be safe would demand that the bridges used in passing from one part of the premises to another, or the ladders used in ascending and descending from the place of labor, and the passage-ways in the premises of the employer, and within the precincts of the place where the labor is to be performed, should be safe and convenient, and at least the same care and precaution be used for the safety of the servant as for that of the stranger whose accidental presence business may require within the same limits. This was said in reference to a bridge for use of employees in passing to and from the defendant's mill.²

B. *Bridges.*

2898. It was held that there is no legal obligation on the part of a railroad company to build its bridges over public roads with an elevation so great that one of its employees,

Letellier, 78 Mich. 502, 44 N. W. 512; *cinnati*, I., St. L. & C. R. Co. v. Coombs v. New Bedford Cordage Lang, 118 Ind. 579.
Co., 102 Mass. 572; Brazil Block ¹ Coombs v. New Bedford Cord-
Coal Co. v. Young, 117 Ind. 520; age Co., 102 Mass. 572.
Rogers v. Leyden, 127 Ind. 50; Cin- ² Buzzell v. Laconia Mfg. Co., 48
Me. 113.

standing upright on top of a car, will not be endangered, and consequently an employee thus injured cannot recover. Such employee is chargeable from the mere fact of his entering upon the employment with a knowledge that this danger existed.¹

2899. It was said: No negligence can be imputed to the railroad company because the struts of the bridge were not high enough to allow a person to pass under them standing upright on the top of the cars. It appeared that an employee could safely pass by stooping or sitting down on the cars, and it was held a want of reasonable care on the part of an employee not to have done so.²

2900. Railroad bridges should be so constructed, as to height, that brakemen who are required to go on top of the cars in the discharge of their duties, while passing over a bridge, may pass through and under the roof of the bridge without danger to their personal safety, but this does not require that the roof shall be of such a height that the brakeman can stand on top of the cars and pass through with safety.³

2901. Where there are bridges or tunnels with roofs or coverings so low as to endanger the lives of those on the top of the cars, a servant is presumed to know of the danger. They pertain to all roads, form a part of the road itself, and in operating trains the brakemen must be presumed to know the mode of construction and the danger of passing over them.⁴

2902. It was said: It seems to us that a railroad company is and ought to be required to construct and maintain its roadway and appendages and its overhead structures in such manner and condition that its employees and servants can

¹ *Baylor v. D., L. & W. R. Co.*, 40 *Chicago & Alton R. Co. v. Johnson*, N. J. L. 23; *Clark's Adm'r v. Richmond & D. R. Co.*, 78 Va. 709. 116 Ill. 206.

² *Baltimore & Ohio R. Co. v. Striker*, 51 Md. 47. ⁴ *Nances, Adm'r, v. Newport News & M. U. R. Co. (Ky.)*, 17 S. W. 570. See, also, *Hughes v. Railway Co.*,

³ *Cleveland, C., C. & St. L. R. Co. v. Walter*, 147 Ill. 60, 35 N. E. 529; 91 Ky. 526, 16 S. W. 275.

do and perform the labors required of them with reasonable safety. This was said in reference to a low bridge with which an employee, not having knowledge of its position, came in contact.¹

2902a. Where an employee was killed by reason of a low bridge, and it appeared that such employee had never been informed of its location or existence and had never passed over the road in his capacity as brakeman except in the night-time, it not appearing that he ever had any opportunity to observe the height of the bridge, it was held that the risk was not assumed.

On the question of the company's negligence in maintaining the bridge, it was said: We are not prepared to say that the defendant was not guilty of very gross negligence in continuing to maintain for so many years a low bridge over which it operated trains with furniture and other cars so high that a brakeman could not stand upon them and pass through the bridge in safety. Such structures have been strongly condemned by this court in prior cases, and if railroad companies will persist in maintaining them to the imminent peril of the lives of their employees who are engaged in the service, whose necessary hazards are so great, it does not seem any hardship to require them to respond in damages to the families of those who are killed thereby.²

2903. Where the question was whether the defendant was negligent in maintaining a low bridge at its then elevation, it was said: But in this inquiry it must not be forgotten that, if the irregularity of the ground surface and the state of the neighboring improvements were such that the bridge could not be raised without too great inconvenience to vehicles crossing it, without great and serious injury to neighboring land proprietors affected by its change, or without too great expense to the railroad corporation, either of these

¹ Baltimore & O. & C. R. Co. v. 378; Pennsylvania Co. v. Sears, 136 Rowan, 104 Ind. 88; Louisville, N. Ind. 460.

A. & C. R. Co. v. Wright, 115 Ind. ² Atchison, T. & S. F. R. Co. v. Love (Kan.), 45 Pac. 59.

would furnish an excuse for not raising the bridge — either of said categories would furnish a case where one convenience would yield to another. This inquiry should be carefully presented to the jury and carefully considered by them.¹

2904. Where a fireman was killed while at the side of his engine in the act of putting out the fire in some waste in the box of a driving-wheel, by contact with the side of a bridge, which bridge, it was alleged, was too narrow, it was held that it was not a breach of duty to maintain low bridges, or bridges of such width that were safe to one exercising ordinary care.²

2905. Where a brakeman was injured by coming in contact with the side of a bridge which was within a few inches of the sides of a car, while he was ascending to the top of a car, it was held that no duty rested upon the company to make its bridges wide enough so that employees would not be endangered in performing their duties.³

2906. Where a brakeman was injured while climbing a ladder on the side of a box-car by contact with one of the stays of a bridge, and it appeared that the track was three and one-half inches nearer the stays on that side than the opposite side, and that he was in the discharge of his duties at the time in response to a signal, it was held that judgment for the plaintiff would not be disturbed. (The case does not disclose the servant's knowledge or opportunity for knowledge of the character of the structure.)⁴

2907. Where a conductor of a freight train was injured by contact with the braces of an overhead bridge, and it appeared the bridge was of sufficient height to permit a man, while standing in the center on the top of an ordinary box-car, to pass under it safely, but if he stood two or three feet

¹ Louisville & N. R. Co. v. Hall, 91 Ala. 112, 8 So. 371.

² Shealer's Adm'r v. C. & O. R. Co., 81 Va. 188.

³ Illick v. Flint & P. M. R. Co., 67 Mich. 632.

⁴ Fort Worth & D. C. R. Co. v. Graves (Tex. App.), 21 S. W. 606.

from the center he could not escape contact with the braces, it was held that the defendant was negligent in maintaining such a bridge, and the rule was declared to be that it was the duty of a railroad company to so construct its track and bridges as will make them safe for its employees to perform their duties, and a party within its service has a right to assume that this obligation has been discharged.¹

2908. A brakeman had been running over a section of road for more than a year on which all the bridges but three were of such a height that he could pass under safely while standing on the top of freight-cars, and the three were of sufficient height to permit him to pass under while standing erect on the top of ordinary box-cars. The defendant had recently introduced furniture-cars, which were of such height that they would not permit an employee to pass under the low bridges in safety while standing erect on the top. Such brakeman was injured by contact with one of such low bridges as he stepped upon one of such furniture-cars. It was held that the maintenance of such low bridges was *prima facie* evidence of negligence, and the defendant was liable, unless the injured employee was chargeable with contributory negligence or with the assumption of the risk.²

2909. It was held by a Kentucky court that the maintenance by a railroad company of a bridge across its track so low as to endanger the lives of its brakemen while in the discharge of their duties on top of cars was wilful negligence, under the statute of the state relating to recovery of punitive damages for wilful neglect.³

2910. It was held by an Alabama court that the fact that a railroad company maintains an overhead bridge of such height that a brakeman standing on the top of a freight-car cannot pass under it in absolute safety constitutes under ordinary circumstances *prima facie* negligence, but it does

¹ St. Louis, Ft. S. & W. R. Co. v. Irwin, 37 Kan. 701, 16 Pac. 146.

³ Cincinnati, N. O. & T. P. R. Co. v. Sampson (Ky.), 30 S. W. 12.

² Atchison, T. & S. F. R. Co. v. Rowan, 55 Kan. 270, 39 Pac. 1010.

not constitute wilful, wanton or intentional negligence, although the bridge could be elevated at small expense and without public inconvenience.¹

2911. Where an injury was caused by the breaking of a bridge from decay of some of its timbers, it was said: The court cannot assume as a legal presumption that the decay of timbers in a bridge can always be ascertained by the use of due diligence. Hence, an instruction which assumed that the company was chargeable with knowledge thereof was held to be error.²

C. Buildings and Yards.

2912. Elevator bin.—It is the duty of the master, having control of the times, places and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which this may be done by the exercise of reasonable caution. When directing the performance of work by the servant in a place which may become dangerous, and which danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precaution as will protect the servant from avoidable danger. This was said where a servant, directed to enter a bin in an elevator, was injured by cakes of grain which had formed falling upon him, and it was held a question for the jury whether the master had adopted all reasonable precaution to shield him from the danger to which he was exposed.³

2913. Floor, slippery condition of.—Where an employee was injured by his feet getting caught between a shaft and the floor, the floor being slippery, causing him to slide or fall, the dangerous character of the machinery being in

¹ Louisville & N. R. Co. v. Banks,
104 Ala. 108, 16 So. 547.

² Toledo, P. & W. R. Co. v. Conroy, 61 Ill. 162.

³ McGovern v. Central Vermont
R. Co., 123 N. Y. 280.

plain sight, it was held that the master was not required to box the machinery; that as it was the normal condition of the floor to be wet and slippery, it was a risk assumed; that as the dangerous character of the machinery was in plain sight, no duty rested upon the master to point it out.¹

2914. The condition of a floor, by reason of its being worn smooth, was held to be within the rule, and the question of its being a reasonably safe place for the servant to perform his work, on that account, was a proper question for the jury.²

2915. Passage-way under shaft.—One who is directed by an employer to drive over a particular way has a right to assume that the way is at least reasonably safe, and, if he had formerly driven over it, that it is as safe as on the former occasion; and if it becomes necessary for such an employee to pass through a narrow passage-way under a revolving shaft, which without his knowledge had been broken and repaired with projecting bolts after his last previous load had been delivered, and the wagon-way so raised that he could not sit and drive thereunder without danger, and he attempts the act under the direction of his foreman while the shaft is in motion, and is caught by the projecting bolts and injured, the master is liable unless by the exercise of reasonable care the employee could have discovered and avoided the danger.³

2916. Passage-way, slippery condition of.—It is the duty of the master to furnish a suitable place in which work may be performed with a reasonable degree of safety to the persons employed, and without exposure to dangers that do not come within the obvious scope of the employment as the business is usually carried on. This was said where an employee was injured while carrying molten metal upon a passage-way which was dangerous when used for such pur-

¹ *Murphy v. American Rubber Co.*, 159 Mass. 266.

³ *Hawkins v. Johnson et al.*, 105 Ind. 29.

² *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714.

pose by reason of being slippery from an accumulation of ice and snow.¹

2917. Privy, unsafe foundation.—Where an employee was injured by the fall of a privy which was insecurely attached to its foundation, the rule was applied. It was said that no duty rested upon her to examine and see if the place was safe from such a defect.²

2917a. Roof-coping, insecure.—Where an employee was injured by stones falling from the coping of a building, and it appeared they were not fastened by iron rods to the wall, and there was some evidence that rods were necessary, and there was evidence also that the work was reasonably safe without them, it was held that the question of defendant's negligence was for the jury.³

2917b. Scaffold in.—Plaintiff, who was a contractor to put in elevators in defendant's building, while examining the premises for such purpose stepped upon an insecure scaffold erected by other contractors who were putting in a tile flooring and was being used by them. It was held the employer was not liable for failure to furnish a safe place to work.⁴

2918. Shed insecure from snow thrown upon it.—Where a common laborer was injured while at work in connection with the erection of a building by the roof of a shed falling upon him which had been rendered unsafe and insecure by the throwing upon it of large amounts of snow and debris, and it appeared it had remained upon the shed several days before the roof fell, it was held that the owners were liable for permitting such a weight to be thrown and remain upon the roof of the shed in which the plaintiff was required to perform his work as rendered his work unnecessarily hazardous. It was assumed that the material was so thrown upon the roof under the direction of the defendants' super-

¹Smith v. Peninsular Car Co., 60 Mich. 501.

³Gibson v. Sullivan, 164 Mass. 557.

²Ryan v. Fowler, 24 N. Y. 410.

⁴Whallon v. Sprague Electric Elevator Co. (N. Y.), 1 App. Div. 264.

intendent or foreman, and that they knew it was there, and they were charged with knowledge of the danger.¹

2919. Steps, movable, in cellar.—The use of movable steps in the cellar of a building, which slipped causing injury to an employee, was held not to be negligence in the absence of proof that they were unsafe in themselves or unsuitable for the place.²

2920. Steps, slippery condition of.—Steps leading from a factory which employees were required to use in going to and returning from their work were held to be within the rule of the master's duty.³

2920a. Store-house, insecure.—Where a corporation rented and used a building for the storage of paper and it collapsed, killing one of its employees, and it did not appear that any one connected with the corporation had any notice of the defect, except possibly one who was a mere foreman, it was held there could be no recovery from such corporation. The mere fact that the building collapsed is not proof that the lessee negligently overloaded it.⁴

2920b. Mines.—It is a positive duty which the owner of a mine owes his servants, after the mine is opened and timbered, to use reasonable care and diligence to see that the timbers are properly set and that they are kept in proper condition and repair. To this end he must provide a competent mining-boss or foreman and make timely inspections of timbers, roofs and walls.⁵

2920c. Portions of the stope or room of a mine from which ore is being taken, and which, as the work progresses, it is necessary to timber, are not, from such time as the tim-

¹ Johnson v. First Nat. Bank, 79 Wis. 414, 48 N. W. 712.

² Regan v. Donovan, 159 Mass. 1.

³ Fitzgerald v. Conn. River Paper Co., 155 Mass. 155; Mahoney v.

Dore, 155 Mass. 513; Osborne v. London & N. W. R. Co., 21 Q. B. Div. 220.

For cases relating to exposed gearing, see COGS, APPLIANCES, KIND, 56, 188-194, 197, 203-207, 298.

⁴ McKenna v. Paper Co., 176 Pa. St. 306.

⁵ Western Coal & Mining Co. v. Ingraham, 70 Fed. 219.

bering becomes necessary, places for work within the rule of the master's duty, but rather a part of the work required.¹

2920d. The employer's duty in respect to furnishing a safe place for a miner engaged in running a tunnel, drilling and blasting from the face of the mine to work was said to be to use proper precautions to prevent the falling of the roof of that part of the tunnel which has been made, and to keep the floor free from debris so as not to obstruct the escape of the miner in case of accident.²

D. Mines, Trenches and Pits.

2921. Where there was evidence that the defendant was constructing a tunnel or gang-way into his mine, and that ordinary care required testing for loose and fractured pieces of coal, and these if found should be knocked down, also that the work was under the immediate supervision of the defendant's superintendent, and that one piece in falling struck a workman and injured him, it was held that such facts were sufficient to send the question of defendant's negligence to the jury. It was said that in such case it is for the jury to say, not whether the employer had adopted the best method of constructing a gang-way, but whether, according to the circumstances, he had exercised proper care.³

2922. Where a miner was injured by the falling of loose rock from the roof of a mine, and it appeared the officers of the mine had knowledge of such conditions as would suggest to them that rock was liable to fall at any time, it was held a question for the jury whether the failure to remove or support such rock was a lack of ordinary care in not providing a safe place for the miners to work.

(Rules of law and of conduct applicable to operators of mines are very fully stated in the opinion.)⁴

¹ *Petaja v. Aurora Iron Min. Co.* (Mich.), 66 N. W. 951.

³ *Vanessa v. Catsbury Coal Co.*, 159 Pa. St. 403.

² *Kelley v. Fourth of July Mining Co.*, 16 Mont. 484, 41 Pac. 273.

⁴ *Union Pacific R. Co. v. Jarvi*, 53 Fed. 65 (C. C. A.).

2923. It was held to be the duty of the owners of a mine to exercise precaution to keep the mine safe from the dangers of falling ore and rock which was being threatened by the existence of a crevice known to the superintendent, who stood in the relation of *alter ego* of the master.¹

2924. Where a boy fifteen years old, employed in a quarry, was set at work close to a projecting rock, which from some unexplained cause fell and injured him, it was held that the defendant was liable upon the ground that it was the foreman's duty to have tested the rock, and if found dangerous to have removed it.²

2925. The rule that general use is the test was stated and applied when buildings about and supports in a mine were used of a certain character, and when it was conceded that those of a different character might have been used which were more safe.³

2926. It was held that a master was not liable for the killing of his servant while working in a cement quarry where frequent blasting is required, where the quarry was a safe place to work, and the accident was caused solely by the negligence of the foreman in placing the servant at work in a certain place too near an unexploded blast. It was said: The master is not chargeable with the consequences of a place for work made dangerous only by the carelessness and neglect of a fellow-servant, though he happen to be a foreman.⁴

2927. The duty of a city to use reasonable care to furnish a safe place for its employees to work does not extend, in the construction of a sewer, to keeping the same safe at every place and at every moment of time in the progress of the work; and if it becomes unsafe through the oversight of a foreman, who is not a vice-principal, to inform a work-

¹ Pantzer v. Tilly Foster Iron Min. Co., 99 N. Y. 368.

³ Coal Creek Mining Co. v. Davis, 90 Tenn. 711.

² McMillan Marble Co. v. Black, 89 Tenn. 118, 14 S. W. 479.

⁴ Cullen v. Norton, 126 N. Y. 1, 26 N. E. 905.

man that a dynamite cartridge has failed to explode, the city is not liable for a resulting injury.¹

2928. Where an employee was injured by the caving in of the sides of a trench from the want of braces, and the contention was that the superintendent of the city had no authority or discretion to purchase, or provide the necessary material for such purpose, and as the negligence charged was that of the superintendent, which excluded the question of the negligence of the city in that regard, it was said: This side of the case is too narrow. The superintendent may be negligent in ordering the work to be commenced or continued when proper material for insuring the safety of the workmen engaged are not at hand, as well as in failing to use such as is at hand; and it was personal negligence on the part of the particular superintendent to allow the work to go on before the necessary materials were procured. That it was a question for the jury whether, in the exercise of due care, the superintendent could allow such a trench as the witnesses described to be opened in sandy soil without protecting the sides by planking.²

2929. The jury were permitted to determine what was the proper way of meeting the danger from caving in of the sides while digging a trench, and having found that the proper way was to shore the sides, then it was held they were warranted in finding that the material necessary to make the trench safe was not furnished, though it appeared there was material some two miles away that the foreman had authority to use, as they might find that this was practically inaccessible on account of the distance. That in this view of the facts the plaintiff's intestate was set at work in a place of danger without the precautions being taken for his safety which the employer was bound to see taken.³

2930. Where an employee was injured by the caving in of the bank of a trench which was being constructed, and a

¹City of Minneapolis v. Lundin, 58 Fed. 525 (C. C. A.).

³Fitzsimmons, Adm'x, v. Taunton, 160 Mass. 223.

²Connolly v. Waltham, 156 Mass.

competent foreman had been employed to have charge of the work and the men employed, and there were materials at hand to shore up the sides, it was held there was no personal neglect on the part of the city, and the neglect to shore up the sides of such trench was the neglect of fellow-workmen. The use and application of the materials formed a part of the duty of the workmen.¹

2931. Where the plaintiff was employed by the city as a laborer in excavating a trench for the laying of water-pipes, and it appeared that upon other laborers in the same employment and working in connection with the plaintiff devolved the duty of putting in wooden curbing as the work of excavating progressed, and as the laborers saw the need of it, to prevent the earth from falling into the trench, it was held that such laborers were fellow-servants with the plaintiff, for whose negligence in putting in the curbing the city was not responsible.²

2932. Where a servant was injured by the caving in of the sides of a sewer while he was at work therein, and it was claimed that his injuries were due to the neglect to brace the sides, and there was no evidence that the defendant failed to furnish sufficient and suitable material for the construction of the required safeguards, it was said: The work was committed to the supervision of a skilful and competent superintendent. It required for the protection of the men the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, and for the preparation of which, as in the case of the scaffold of the mason or carpenter, the master is not liable, unless there is something to show that he assumed it as a duty independent of the servant's employment. The occasional presence of the

¹Dube v. Lewiston, 83 Me. 211. ²Berquist v. City of Minneapolis, See, also, Conley v. Portland, 78 Me. 42 Minn. 471, 44 N. W. 530. 217; Cook v. N. Y. C. & H. R. R. Co., 119 N. Y. 653.

defendant as the work went on is not enough to charge him with the duty.¹

2933. Where a common laborer was injured by a portion of the crust at the top of the bank caving in upon him while he was at work in a trench which uncovered an old sewer, and, observing that the crust was hanging over and likely to fall, he told the foreman that the top ought to be broken in before shoveling the dirt and sand, but the foreman said that there was no fear, that he would risk it, the court held that the defendant was not liable. The negligence, if any, was that of the foreman, who was the plaintiff's fellow-servant.²

2934. A distinction is made between cases where the employees are of the crew who are making the trench, and where, after it is made, an employee is set at work to perform labor of a different character in the trench, which is a means prepared for doing the work. Hence it was held that when an employee had been ordered to clean out certain underground water-pipes, and a trench had been opened for the purpose of furnishing him a proper place and opportunity to do the work by the defendant's section-men and other laborers, and while he was engaged in disconnecting such pipes the earth caved in upon him, causing his death, the defendant was liable; that it was a personal duty on the part of the master to furnish him a safe place to work.³

2935. Where it was alleged that the defendants, who were the selectmen of a town, were negligent in failing to provide suitable means of support for the sides of a trench in which they had employed the plaintiff to lay pipe for the purpose of building a public sewer, it was held they were bound, when they hired him to work in a particular place, to see that it was reasonably safe and that materials were furnished to make it so; and if any injury occurred to him through their neglect in these respects, they are liable.⁴

¹Zeigler v. Day, 123 Mass. 152; ²Kranz v. Long Island R. Co., 123 Johnson v. Boston, 118 Mass. 114; N. Y. 1.

Floyd v. Sugden, 134 Mass. 563.

⁴Breen v. Field et al., 157 Mass.

²O'Conner v. Roberts et al., 120 Mass. 277.

Mass. 227.

2936. Where an employee was injured by the caving in of a bank of earth, and it appeared that other employees had attempted to break it down and failed, the question was said to be, not whether the adhesive force was weakened so that the bank fell and injured the plaintiff, nor would such necessarily in law constitute a want of ordinary care, but whether a person of ordinary care would have used the same or like means to break down the bank, and after having done so, would have continued to require an employee to work under it; and further, even if an ordinarily prudent man would not have done so, did the plaintiff use ordinary care, with the knowledge he had, to avoid injury from the bank when it fell.¹

2937. Trench, covering over.—The rule was applied where the covering over of a ditch in the master's premises was insufficient to sustain the weight of a heavy wheel made of iron, and the question of negligence on the part of the master, and of risks assumed by the servant, were held proper for the jury.²

E. Tracks.

2938. Character of.—It was said the duty of a railroad company to maintain a safe track and appliances must be taken with the qualification, so far as its servants are concerned, that the servant does not know of the defect, or, if he does know, that he has reported it and has remained on duty under the promise or reasonable belief of speedy repair. This was said where an engineer knew there was no target upon a switch.³

2939. If the ties of a railroad track are long enough to support the engine and cars so long as they remain on the rails, no inference of negligence can be drawn from the fact that after the engine leaves the rails it turns over by reason of some of the ties being old and rotten.⁴

¹ Deppe v. C., R. I. & P. R. Co., 36 Iowa, 52.

² W. C. De Pauw Co. v. Stubblefield, 132 Ind. 182.

³ Railroad Co. v. Gurley, 12 Lea (Tenn.), 46.

⁴ Ward v. Bonner et al., 80 Tex. 168, 15 S. W. 805.

2940. Where the charge was that the rails were old and worn, it was said: The defendant was not bound to furnish a safe track. The duty in that respect is to use all reasonable care and precaution in putting and keeping the track in good order and condition. What is such reasonable care in a given case depends upon the surroundings and the dangers to be fairly apprehended and encountered. If the rail had no visible defect, but was broken by reason of the frost and cold weather, then the defendant is not liable.¹

2941. Where the evidence tended to show that the rail was too weak and light to support the engine and rolling-stock used on the road, and the derailment of the engine was caused by a broken switch-rail, negligence was presumed. It was held that the risks of such defects were not assumed in the absence of notice.²

2942. There is no rule of law to restrict railroads as to the curves they should use in their freight stations and yards where the safety of passengers is not involved. The engineering question as to the curves to be made in the track of a railroad within such places is not a question to be left to the jury to determine.³

2943. Where the track was built by private persons for the purpose of shipping ice over the defendant's road, it was said if it was sufficient for the occasional and special use for which it was designed and used, though unfit for general use, it was all the law required.⁴

2944. Where the ties in a railroad yard lay exposed above the ground, the space between them being unfilled, and at the place of injury crooked ties had been put down, their exposure being greater, and the track was rougher and more dangerous than elsewhere in the yard, and a brakeman was injured by stumbling at such place while performing

¹ Devlin v. Railway Co., 87 Mo. 545.

² Clapp v. Minneapolis & St. L. R. Co., 36 Minn. 6, 29 N. W. 340.

³ Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189.

⁴ Stetler v. C. & N. W. R. Co., 46 Wis. 497.

his duties, it was held that there was evidence of negligence on the part of the defendant in thus maintaining its yard.¹

2945. Condition of.—Where a fireman was injured in a wreck caused by the track sinking by reason of a great accumulation of water which could have been prevented by a sufficient outlet, and it appeared that on previous occasions the tracks had been overflowed at the same point, it was held the evidence was sufficient to sustain a verdict against the defendant.²

2946. Where a section-man, while walking along the track to reach his place of work, was injured by a train jumping the track owing to rotten ties and rails insufficiently fastened, it was held he could recover.³

2947. Where the jury found that the injury to a brakeman, while on the back of a tender to an engine prepared to make a coupling to a car, was caused by the sinking of the track at that point, thus permitting the draw-bars to slip by, it was held that the defendant was liable for a failure of duty to inspect the track and keep it in a reasonably safe condition, which duty the plaintiff had a right to assume had been performed.⁴

2947a. Low joints in a track which is otherwise in good order, is rock ballasted, and trains can safely run over it forty or fifty miles an hour, is not a negligent defect, where it appears that the ground is wet and the unevenness is caused by frost coming out of the ground and cannot be avoided in railroading.⁵

2948. The duty of a railroad in respect to the condition of its track is not that it shall be at all times safe. A railroad track is constantly wearing out and requires frequent renewals, and it is often necessary for gravel and construc-

¹ *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886. ⁴ *Texas, S. V. & N. W. R. Co. v. Guy* (Tex.), 23 S. W. 633.

² *Stoher v. St. Louis, I. M. & W. R. Co.*, 105 Mo. 192, 16 S. W. 591. ⁵ *Atchison, T. & S. F. R. Co. v. Croll* (Kan. App.), 45 Pac. 112.

³ *Swadley v. Missouri Pacific R. Co.*, 118 Mo. 268, 24 S. W. 140.

tion trains to go over and upon unsafe portions of the track to transfer materials needed for repairs. The duty of the company, under such circumstances, is to give timely notice of the insecurity so that the necessary precautions may be adopted to avoid danger.¹

2949. The track is one of the instrumentalities of the road, and therefore something which it is the master's absolute and personal duty to employ due care in maintaining and keeping in a condition suitable to the purpose for which it is to be used, that is to say, in such a condition that it can be safely used for such purposes. It was therefore held, applying the foregoing rule, that the act of a section foreman in taking up a rail for track repair without putting out proper signals to warn approaching trains was chargeable to the defendant, where an employee upon a wood-train was injured by such negligent act on the part of the section foreman.²

1. Tracks, Side.

2950. Character of.—Railroad tracks are not ballasted for the purpose of making them safe for the employees of the company to walk thereon, but to make them firm and safe for the passage of trains. The failure of a railroad company to ballast a side-track used for storing cars and making up trains is not a breach of any duty it owes to employees.³

2951. It is not within the province of a jury to determine the method of constructing side-tracks.⁴

2952. It was said a railroad company does not owe its employees the same duty as to its side-tracks as to its main track, as regards the safe condition thereof. The use to which they are put does not require as perfect condition. Hence

¹ St. Louis, I. M. & S. R. Co. v. Morgart, 45 Ark. 318; Henry v. L. S. & M. S. R. Co., 49 Mich. 495, 13 N. W. 832.

³ Finnell v. D., L. & W. R. Co., 129 N. Y. 669.

⁴ Twitchell v. Grand Trunk R. Co., 39 Fed. 419.

² Drymala v. Thompson et al., 26 Minn. 40.

it was held that a railroad company was not required to ballast its side-tracks, and such risks as were occasioned by a failure so to do were assumed by the employees.¹

2953. Yet it was said in *Ragon v. Railway Co.*, 91 Mich. 379, 51 N. W. 1004, that it was not a rule that railroad companies owe no duty to their employees in respect to the condition of their side-tracks.

Upon a second appeal it was held that the defendant was not guilty of negligence in not ballasting a side-track in such a manner as to cover the ends of the ties near the rails. It was said it was not within the province of juries to prescribe the manner of using side-tracks or the character of appliances which an employer may use.²

2954. A jury were permitted to find that it was negligence on the part of a railroad company not to ballast or fill in between the ties of its side-tracks with dirt or cinders, so as make a smooth surface for employees to walk upon while coupling cars or performing other duties.³

2955. Ordinarily a master will not be permitted to show, as a defense to an action by an employee for not furnishing reasonably safe and suitable machinery, appliances or premises, that it was the universal custom of other masters to furnish defective implements or an unsafe place to work. This was said in reference to showing a custom on the part of a railroad company of using worn rails for side-tracks, and admitting the testimony of road-masters, in effect, that the track was in a reasonably good and safe condition.⁴

2956. Where it appeared that the defendant had taken partially worn rails from its main track and put them in a side-track, the defendant offered to prove that this was the universal custom of other roads. The proof was excluded.

¹ *Batterson v. C. & G. T. R. Co.*, 53 Mich. 127, 18 N. W. 584; *O'Donnell v. S. S. & A. R. Co.*, 89 Mich. 174, 50 N. W. 801. See, also, *Stetler v. Railway Co.*, 46 Wis. 497.

² *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 Mich. 265, 56 N. W. 612.

³ *C. & E. I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021.

⁴ *Lake Erie & W. R. Co. v. Mugg, Adm'x*, 132 Ind. 168.

It was held that such evidence was admissible to rebut an inference of negligence.

It was said that from such a use of old rails the conclusion of negligence does not follow as a matter of course. It was so doubtful that the defendant was entitled to show that its conduct was in accord with that of others engaged in the same business; thus leaving it for the jury to determine the question of ordinary care.¹

2957. Where an inexperienced brakeman was unable to couple cars on a side-track by reason of its being rough and uneven, and thereupon he mounted a flat-car to perform that duty, and was thrown from the car by a sudden jolt caused by such condition of the track, it was held that it sufficiently appeared that his injuries were caused by the defective condition of the track and that defendant was liable.²

2958. Condition of.—Where the only obstruction at the end of a coal wharf to prevent cars from being pushed over the end was a log chained to the wharf, and while some cars were being slowly pushed along the track they came against the obstruction whereby the chain was broken, letting the cars go over the brink, carrying with them a brakeman who thereby lost his life, and it appeared the company had some four years before ordered the timbers to build a deadlock there, but it was never done, it was held the defendant's negligence was clearly shown.³

2959. Where the defendant had caused dirt to be thrown out between the cross-ties of a track in its yard, leaving deep holes, and the road-master had been informed of the danger, but failed to remedy the defect, and an employee in the yard employed to couple cars was injured while performing his duty by stepping into such a hole, not knowing that they were there, it was held sufficient to charge the defendant with negligence.⁴

¹Doyle v. St. Paul, M. & M. R. Co.,
42 Minn. 82.

²Trinity & S. R. Co. v. Lane, 79
Tex. 643, 15 S. W. 477.

³Norfolk & W. R. Co. v. Gilman's
Adm'x, 88 Va. 239, 13 S. E. 475.

⁴Missouri Pacific R. Co. v. Jones,
75 Tex. 151, 12 S. W. 972.

2960. It was held a question for the jury whether the space left under a switch-rod was so unnecessarily large as to render the place of work for employees unsafe.¹

2961. It was held to be the duty of a railroad company to keep its tracks free from obstructions, such as ice, snow and rubbish which endanger the operation of the road. The facts were that defendant's yard-master was injured by the derailment of an empty box-car upon which he was riding in the yard, and there was evidence that considerable dirt, ice and snow and chaff came up to and between the flanges of the rails and quite close to the top of the rail. This was held to warrant a verdict that the injury was caused by the negligence of the company in respect to the maintaining of a safe track.²

2962. A brakeman was injured while coupling cars on a side-track. The track was covered with a thick slush of ice, snow and water to a depth of one or two inches, which concealed from sight the condition of the track under it. The plaintiff while making the coupling stepped into a hole in the track which was from six to twelve inches deep. There was testimony tending to show that the side-track at the place of injury was not well ballasted or surfaced. It was held that whether the defendant had discharged its duty in keeping the track in a reasonably safe condition for the performance of the work of coupling cars by its employees was a question for the jury.³

2962a. Tracks, ditches in.—Where a brakeman while in the act of coupling cars stepped into a ditch across the track, the existence of which he was ignorant, and it appeared that the rules permitted coupling when cars were moving at a safe rate of speed, and that the foreman in charge of the road-bed had knowledge of the ditch being there for some months, it was held that such facts established a *prima facie* case of negligence.⁴

¹ *Hannah v. Conn. River R. Co.*, 154 Mass. 529.

² *McClarney v. Chicago, M. & St. P. R. Co.*, 80 Wis. 277.

³ *Northern Pacific R. Co. v. Tester*, 63 Fed. 527.

⁴ *Hollenback v. Missouri Pac. R. Co. (Mo.)*, 34 S. W. 494.

2962b. Where it appeared that a switchman was injured by stepping into a hole between the ties in a yard while coupling cars at night, that he was not familiar with the yard, and it did not appear when or by whom the hole was made or that defendant was chargeable with notice, it was held sufficient did not appear to establish a *prima facie* case of negligence.¹

2. Culverts.

2963. It was said to be the duty of railroad companies to cover culverts within their yards and within reasonable distance of switches, wherever brakemen would be apt to go in switching and coupling cars. By reason of some unforeseen accident or extraordinary occurrence a coupling might in some instance have to be done at any place on the line of the road, far distant from any yard or switch, but the company is not bound to anticipate any such unusual occurrences.²

2963a. The duty of the master in respect to the construction of its tracks is that of the exercise of reasonable care in providing culverts for the escape of water collected and accumulated by its embankments and excavations. Engineers have a right to rely upon the company as having properly constructed the road and to presume it had made proper inquiry in respect to latent defects, if there were any, in the construction, for such was its duty; and he cannot be held to knowledge of danger lurking (speaking of the place in question) in this narrow seam in the mountain side by whose inequalities its sinuosities were hidden.³

2964. The rule was stated that a railroad company was liable for injuries caused by the washing out of a culvert, if the defective manner in which it was constructed contributed to the cause of its giving way, even though the immediate

¹ *Artis v. Buffalo R. & P. R. Co.* St. P. R. Co., 37 Minn. 409, 34 N. W. v. (N. Y.), 3 App. Div. 1. 898.

² *Franklin, Adm'x, v. Winona &* ³ *Union Pacific R. Co. v. O'Brien,* 161 U. S. 451.

cause was the giving way of a dam constructed across the river by another upon his own land whereby an excessive quantity of water flowed to and against the culvert.¹

2965. Where an engineer upon a railroad constructed along the foot of a mountain range was killed by the derailment of his engine by reason of gravel on the track, which during a storm had washed down the mountain side through a natural gully, there being no culvert for its escape under the track, it was held that the question of negligence in not constructing a culvert at the place was one for the jury to determine on the evidence as to the construction of the road and the formation of the land. (*Tuttle v. Railway Co.*, 122 U. S. 189, distinguished.)²

2965a. Where water froze upon a track, causing derailment of a car, resulting in the death of an employee, it was held a question for the jury, upon conflicting evidence, whether there was negligence on the part of the company in not foreseeing the danger and providing a drain.³

2966. It was held that negligence was not shown where it appeared a section-man fell into an open water-way while pushing a hand-car; and so long as it was properly constructed negligence would not be inferred from the fact that it was left open.⁴

2967. Where a cattle-guard was maintained close to a scale used for weighing cars, and a brakeman but three days in the service, and without knowledge of the structure, was injured in the night-time while coupling cars over such cattle-guard, by stepping into it, it was held that the jury were warranted in finding that it was negligence; under the circumstances, to maintain the cattle-guard at that place, and that such employee had not assumed the risk from it. It

¹ *Bonner et al. v. Wingate et al.*, 49 Fed. 538 (C. C. A.); affirmed, 161 78 Tex. 333, 14 S. W. 790; *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. 305.

³ *Balhoff v. Mich. Cent. R. Co.* (Mich.), 65 N. W. Rep. 592.

² *Union Pacific R. Co. v. O'Brien*,

⁴ *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 557.

was said, however, that the act of the defendant in maintaining such cattle-guard would not render the defendant liable, if it was obvious or known to such employee at the time of the accident.¹

3. Obstructions Near.

2968. Clinkers at side.—It was held that the presence of one clinker of unnatural size on the margin of a railway track where switching is to be done, and on which a brakeman accidentally steps in descending from a moving engine in the due course of his duties, will not render the company liable to answer for a personal injury which the brakeman thus sustains. For outdoor premises to be reasonably safe, it is not required that the surface shall be kept clear of every object which, by chance, might cause accidental injury.²

2969. Lumber piled near.—While leaving cars upon a side-track an employee was injured by coming in contact with a pile of lumber within a few feet of the track. The *gravamen* of the complaint was that the defendant had permitted the grounds adjacent to such side-track to become so obstructed as to render it unnecessarily dangerous to the plaintiff in the performance of his duties. It was said: It is as much the duty of a railroad company to keep its tracks in proper repair as it is to keep its machinery, engines and cars in such repair. Permitting the same to be unnecessarily obstructed in such manner as to increase unnecessarily the danger to its employees is negligence for which the company is responsible.³

2970. Post on platform erected for private use.—Where a railroad company had permitted, or rather had not objected to, the maintenance of a post by a station-agent to support a clothes line, upon the platform and near the track, and a brakeman while in the discharge of his duties came

¹ *Fredenberg v. N. C. R. Co.*, 114 N. Y. 582.

³ *Bessex v. C. & N. W. R. Co.*, 45 Wis. 477.

² *Lee v. Central R. & B. Co.*, 86 Ga. 231, 12 S. E. 307.

in contact with it and was injured, it was held the company was liable. The ground stated was that as the post was in no way connected with the use of the railway, the employee had a right to presume that there was no such obstruction there, and, in the absence of knowledge on his part of the existence of such post, he was not negligent in not looking out for it. The defendant was negligent in allowing the post to be erected and maintained so near the track as to add to the danger of employees.¹

2971. Rails near.—It was held that it was a failure of duty on the part of the railroad company to leave an iron rail near the track where a train operative, while in the performance of his duties, fell over it, causing him injury; that the action of the section-master in so leaving the rail was chargeable to the company.²

2972. Yet in another court it was held that the duty on the part of a railroad company to keep its freight yard in such a condition that its employees may do their work in reasonable safety does not extend so far that it may not have rails or sleepers near its track.³

2973. Rocks in cut.—A railroad company having cut its road-bed along the side of a mountain, it is negligence for it to leave masses of rock which had been loosened in blasting in such a position as likely to fall at any time upon the track; and it is not relieved from responsibility by the fact that it hires a track-walker, whose duty it is, before and after the passage of each train, to see whether the rock has fallen or is about to fall. This was held where a brakeman was injured by the derailment of a train caused by contact with rock which had fallen upon the track.⁴

2973a. Wagon left near.—Where a brakeman was caught, while stepping from between cars he had coupled, between

¹ Kearns v. C., M. & St. P. R. Co.,
66 Iowa, 599.

⁴ Bean v. Western N. C. R. Co.,
107 N. C. 731, 12 S. E. 600.

² Hall v. Missouri Pacific R. Co.,
74 Mo. 298.

See ASSUMED RISK, 599 et seq.,
723 et seq.

³ Thompson v. Boston & Maine
R. Co., 153 Mass. 391.

a wagon left close to the track during the noon hour and one of such cars, the wagon being so left by a person unloading coal, and it did not appear the company had notice, though it did appear that the wagon about two weeks before had been left in such position, it was held there was no evidence of negligence on the part of the company.¹

4. Structures Near.

2974. Buildings and awnings.—Where a member of a switching crew in a railroad company's yard was injured while upon a car by contact with a shed or warehouse located close to the tracks, it was said: The negligence of the defendant is undisputed. It was the duty of the defendant to supply a safe place for its employees to work. There is no excuse for the laying of this track so close to the building. It was unsafe and dangerous.²

2975. It was held that maintaining an awning upon a building which projected to within eighteen inches of the track, so that when a car stands upon the track the inside edge of the car is about even with the outside edge of the awning, was negligence, and that an employee not chargeable with knowledge, who was injured by contact therewith, could recover from the company.³

2976. Where a brakeman who had been only three days in the service was injured while descending from a car upon a ladder at the side, being struck by the eaves of a section-house located upon a side-track, within fourteen inches of the ladders upon a car, it was held that it was gross negligence to place this section-house so near the track. It was held a question for the jury to determine whether, considering the distance of the house from the switch, the company was so bound to anticipate such act at such place, it being declared that the custom of brakemen, in jumping from

¹ Connors v. Elmira, C. & N. R. Co., 92 Hun, 337.

³ Illinois Central R. Co. v. Welch, 52 Ill. 183.

² Sweet v. Mich. Cent. R. Co., 87 Mich. 559, 49 N. W. 882.

moving cars, was proper to be shown as bearing upon the question.¹

2977. Cattle-chute.—It was said that the usual practice of railroad companies in operating their roads and constructing their machinery and buildings cannot be ground for relief from liabilities for injuries sustained, if the custom or practice disregards the safety of employees as required by law. This was said in regard to a cattle-chute erected close to the track; but the court found, contrary to the verdict of the jury, that it was not located so near as to be unnecessarily dangerous to an employee using due care.²

2978. Where an employee was injured by contact with a cattle-chute located near a side-track, it was said that it was negligence *per se* on the part of a railroad company to construct and maintain cattle-chutes dangerously near the tracks, where it is not a practical necessity so to do; and that such may be in conformity to a custom among railroads would not justify the act or relieve the company from the charge of negligence.³

2979. Fence to cattle-guard.—It was said a railway company is required to place its signal-posts, cattle-guard fences and other structures used in connection with the road at a safe distance from the track, to the end that they will not be dangerous to the employees operating the trains. This rule was declared where the facts were that an engineer, while outside the cab attending to some repairs upon the tank of his engine, came in contact with a fence which could have caused him no harm had he been in his cab. It was held, however, that the facts presented a question for the jury whether the fence was erected too close to the track.⁴

2980. Where an employee was injured by contact with a wire fence at the end of a cattle-guard, while he was upon

¹Flanders v. C., St. P., M. & O. R. Co., 51 Minn. 193, 53 N. W. 544. ³Dorsey v. Phillips & Colby Const. Co., 42 Wis. 583.

²Allen v. Burlington, C. R. & N. R. Co., 64 Iowa, 94. ⁴Murphy v. Wabash R. Co., 115 Mo. 111.
57 Iowa, 623.

a moving train but in an exposed position at the side of the car looking under it to discover whether there was any defect in the appliance, a defect being suggested to him by gravel being thrown from under the car, and it appeared that the fence was three feet two inches from the rail, and that all such, along the line, were constructed substantially the same distance, and in the same manner, and no accident from such cause had happened before, it was held that, conceding that the fence could, with reasonable care, have been so constructed that the deceased could have passed the same without injury, yet the accident was improbable, and was due to causes of such rare occurrence that the defendant, in the exercise of reasonable diligence, was not required to provide against it.¹

2981. Mail-crane.—Where an employee while ascending the side of a car came in contact with the stationary arm of a mail-crane recently erected close to the track, it was held that as it appeared that the defendant had erected, years before, two other cranes similarly located with reference to the track, that the same kind of cranes were used on other roads and located no further from the track, and it not appearing that it was practicable to have one located a greater distance from the track and have it answer the purpose, there was no evidence authorizing the submission to the jury of the question of negligence in the location of the crane.²

2982. Where an employee while mounting a car in a moving train, in the night, was struck by a mail-crane located so as to be distant about twenty-two inches from the ladder of a box-car, and it appeared that when the train started he was in a store near by and ran to catch the train, it was held there was no evidence that the structure was located so as to be dangerous to employees when engaged in the line of their duties, and that a nonsuit was proper.³

¹ McKee v. C., R. I. & P. R. Co.,
63 Iowa, 616.

³ Wolf v. East Tennessee, V. &
G. R. Co., 88 Ga. 210, 14 S. E. 199.

² Sisco v. L. & H. R. R. Co., 145
N. Y. 296.

2983. Where a fireman was killed by coming in contact with a mail-catcher located near the track, it was held that the railroad company had no right to erect machinery for any purpose so near the track that the slightest indiscretion on the part of the employees might prove fatal.¹

2984. Platform.—Yet where a platform for loading stone was maintained so near the track as to leave a space of but a few inches between it and the sides of a car upon such track, it was held that it was not negligence *per se*, nor was the structure of such a dangerous character, as to require warning of its precise location and danger to brakemen in the company's employ.²

2985. Post supporting bridge.—Where a locomotive engineer was injured by contact with a post erected about a week prior as a temporary support to a bridge, within four feet from the track and two feet from the tender-beam, where he was at the time, and it appeared he had passed it daily, but did not know it was there, and also many other permanent structures were as close or closer than this post, as he knew, and that the only thing he did not know was the location of this particular post, it was said that it was necessary for railroad companies to put up structures near enough to their tracks for it to be possible for persons on the trains to come in contact with them. A railroad company is not bound to give warning of every structure to every person employed upon its trains. It was held that such risk was one incident to the employment.³

2986. Switch.—Where a yard-master who had worked in the yard for more than a year was injured, in jumping from a moving engine, by alighting upon or against a stub-switch, the end of the handle extending to within two feet and seven inches of the nearest rail, and it appeared the switch was spiked and had never been used, and the testi-

¹C., B. & Q. R. Co. v. Gregory, 58 Ill. 272.

³Thain v. Old Colony R. Co., 161 Mass. 353.

²C., R. I. & P. R. Co. v. Clark, 108 Ill. 113.

mony of the injured employee was that he did not know it was there, it was held that it could not be said as a matter of law that there was no negligence on the part of the defendant in placing the switch-stand where it was, especially as to employees compelled to perform their duties in the darkness of the night.¹

2987. Where a switchman was injured, while in the act of alighting from a moving car, by contact with a switch-stand located nine or ten inches from the car, and it appeared he had only been there employed seven or eight days, and he did not know of its location, it was held that a verdict of the jury finding the defendant negligent would not be disturbed; that the peril arising from such cause was not a risk assumed by him upon entering the service.²

2988. Signal-posts.—It is the duty of a railway company to place its structures and signal-posts at a reasonably safe distance from its tracks, so as not to be dangerous to brakemen and other operatives upon trains, or to warn them if such dangers exist. The employees are not presumed to assume the risk of such perils in the absence of notice. This was said where a signal-post was erected in the center of a space between two tracks close to each other, and where the employee had worked more than two weeks, passing the post many times a day, and was charged with knowledge of its existence, though not of its precise distance from the track.³

2989. Telegraph poles.—It was held negligence *per se* for a railroad company to permit, for years, a telegraph pole to remain within eighteen inches of a freight-car that might be passing on the track.⁴

2990. Trestle.—Where a brakeman was killed while descending from a moving car by a side ladder, by being brushed off in contact with a trestle located within fourteen

¹ Colf v. C., St. P., M. & O. R. Co., 87 Wis. 273, 58 N. W. 408.

² Pidcock v. Union Pac. R. Co., 5 Utah, 612, 19 Pac. 191.

³ Johnson v. St. P., M. & M. R. Co., 43 Minn. 53, 44 N. W. 884.

⁴ Chicago & Iowa R. Co. v. Russell, Adm'r 91 Ill. 298.

and one-half inches from the side of a car, it was held that the question of defendant's negligence in maintaining such a trestle in such a manner was a proper question for the jury.¹

2991. Water tank.—It was said: The mere fact appearing in evidence that a tank was erected close to the track, closer than was necessary, so close that a man hanging on the outside of a car would be struck in passing, is not of itself any evidence of negligence. The court state that there should be affirmative proof showing that the location of the tank in that position was negligence. That the conditions, surroundings and customary manner of building such tanks should be shown in determining whether there was an absence of proper care.²

2992. Yet, where an instruction as to the defendant's duty in relation to the location of structures was under consideration, it was said: The instruction should have expressed the thought that, if the structure (a water crane connected with a water tank) was dangerous to persons operating trains in the exercise of ordinary care, the defendant was negligent in constructing it.³

F. Place Made Unsafe by Act of Fellow-servant.

2993. The rule has no application to premises made unsafe by the negligent manner in which fellow-servants are performing their work.⁴

2994. Ashes dumped on track.—It was held a brakeman could not recover for injuries received through being thrown in front of a moving train by stumbling over a pile of ashes wrongfully dumped between the rails by a fireman. The

¹ Robel, Adm'r, v. C., M. & St. P. R. Co., 35 Minn. 84, 27 N. W. 305.

² Davis v. Columbia, etc. R. Co., 21 S. C. 93. See, also, Hicks v. Sumter Mills, 39 S. C. 39.

³ Gould, Adm'r, v. C., B. & Q. R. Co., 66 Iowa, 590. See ASSUMED RISKS, 602 et seq., 735 et seq.

⁴ Connors v. Holden, 152 Mass. 598; Hussey v. Coger, 112 N. Y. 614; Quebec Steamship Co. v. Merchant, 133 U. S. 375; Baron v. Detroit & C. S. N. Co., 91 Mich. 585, 52 N. W.

22; Cullen v. Norton, 126 N. Y. 1, 26 N. E. 905.

fireman and brakeman were fellow-servants and so also were the section-men whose duty it was to remove them. The defendant had furnished a good road-bed, and in this respect had done its duty in furnishing a safe place. It was rendered unsafe, temporarily, by the act of a fellow-servant. In order to bind the defendant, actual notice of the obstruction must be shown, or it must be shown to have existed for such a length of time that the law will imply notice. Neither is shown. The judgment for the plaintiff was reversed without ordering a new trial.¹

2995. Car left close to another track.— Where a brakeman was brushed from the side of a car by contact with a car standing on a side-track too close to the main track, and it appeared that such car was placed there by another train crew, it was held that an instruction leaving the question of defendant's negligence to the jury was improper. The act of leaving the car close to the main track was that of a fellow-servant of the brakeman, for which the defendant was not responsible.²

2996. Where the negligence charged was that the employee was not furnished a safe place to work, in this, that the track was obstructed by cars, it appearing that a train had broken in two, and part of the cars were standing upon the track, and that those in charge of them failed to signal the approaching train upon which plaintiff was employed, it was said that the negligent use by an employee of perfect working machinery will seldom be adjudged a breach of the master's duty of providing a safe place for his employees. Such a construction would make any negligent misplacement of a switch, any collision of trains, even any negligent dropping of tools about a factory, a breach of duty of providing a safe place. The true idea is that the place and instruments in themselves must be safe, for this is what the master's duty fairly compels, and not that the

¹ *Loranger v. Lake Shore & M. S. R. Co.* (Mich.), 62 N. W. 137.

² *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924.

master must see that the negligent handling by an employee of the machinery shall not create danger.¹

2997. Where an unattached car, left at night on a side-track near a railroad station, was in some manner moved upon the main track, obstructing it, and in a collision with a train a brakeman was injured, and the court assumed that the only reasonable inference from the proven facts was that it was moved by the force of the wind, it was held that negligence on the part of the company did not appear, it appearing that it was the duty of the station agent to see that the main track was kept unobstructed. Even if he was derelict in his duty (which the evidence did not show) he was a fellow-servant of the injured brakeman.²

2998. Where a car was left on a track dangerously near another track upon which employees were required to operate trains, and an employee on one of such trains was injured by contact therewith, it was held that the proximate cause of the injury was the act of fellow-servants in leaving the car in that position.³

2999. Where a fireman was injured by collision with a car which had either from its own weight, or by force of the wind, moved from a side-track on to the main track, and there was some evidence tending to show that the brakes were defective, it was held the company was liable upon the ground of failure of duty in furnishing an unobstructed track.⁴

2999a. Where an employee acting as brakeman was injured while descending a car upon its side ladder, by coming in contact with a car which was wider than the ordinary car, and standing on a side-track used for storing cars, and which track was parallel with the main track, it was held that the defendant did not owe it as a duty to the plaintiff to change the position of its tracks or to discontinue the use

¹ Jenkins v. Richmond, etc. R. Co., 39 S. C. 507.

² Toner v. C., M. & St. P. R. Co., 69 Wis. 188.

³ Dacey v. Old Colony R. Co., 153 Mass. 112.

⁴ Henry v. Wabash Western R. Co., 109 Mo. 488.

of cars of such width, or to make a change in its custom of storing these and other cars upon the side-track; and therefore, in a legal sense, the defendant was guilty of no breach of duty and of no negligence towards him. The plaintiff assumed the risk arising from these things.¹

3000. Where a car-repairer was injured while repairing a car on a repair track by reason of a leaning car, with others, being moved on another parallel track, striking a car on the repair track, which was placed at the end of the repair track so that it came close to cars moving on such other track, which car was thus moved with sufficient force to cause other cars between it and the one upon which such employee was at work to move, and one of such to strike the car upon which plaintiff was at work, causing it to fall and injure him, it was held that sufficient appeared from which a jury were justified in holding that there was a failure of duty on the part of the defendant in providing such employee a reasonably safe place in which to perform his service.²

3001. Demolishing old buildings.—The rule was not applied where an employee was injured by the negligent manner in which another employee attempted to take down an old building. It was said: The employer is not liable upon the ground of placing a servant to work in a dangerous place without instructions, if the place in which the work was done was safe and proper, and the only negligence was that of a fellow-servant of such employee in the manner of doing the work.³

3002. Derrick near track.—Where it appeared that a railroad company suffered a derrick, not actually in use for the purpose of its business, to remain for an unreasonable length of time on land within its control, in such a position by the side of the track as to be in danger of being thrown

¹Content v. N. Y., N. H. & H. R. Co., 165 U. S. 267.

³Connors v. Holden, 152 Mass. 598.

²St. Louis, A. & T. H. R. Co. v. Holman, 155 Ill. 21, 39 N. E. 573.

down by ordinary natural causes, and would, if it fell, interfere with the safe passage of trains, and it did fall, whereby a brakeman upon a train was injured, it was held that the company was liable upon the distinct grounds that the injury resulted from neglect in not removing the derrick, or in not guarding against the danger of allowing it to remain, even though it was put up by other servants of the corporation, and independently of their negligence.¹

3003. Where a derrick was placed near a track for the use of shippers, and the arm of the derrick, to which was attached a hook, swung over the track, injuring an employee who, in the performance of his duties, came in contact with it, it was said that the duty of the master was to place such an implement under the charge of a competent servant, charged with the duty of seeing that it was properly used and properly secured when not in use, and there being absence of proof that the derrick in question was so placed in charge of a competent person, the jury were justified from the evidence in finding the defendant negligent.²

3004. Floor, trap-door in left open.—The maintaining of a trap-door in the floor of a hallway in a manufacturing establishment as a necessary means of reaching the cellar, where all the employees have knowledge of its existence and use, and only one of them having occasion to use it, who has strict orders always to close it after him, is not negligence in the proprietors towards the workmen, although it be without any device for keeping it closed and the hallway be imperfectly lighted.³

3005. The maintenance of an opening in the floor of a cotton mill, as a means of access to a well underneath is, not negligence on the part of the owner, when he has provided a cover therefor, strong and safe when in place, and given orders that it be kept in place.⁴

¹ *Holden v. Fitchburg R. Co.*, 129 Mass. 268.

³ *Pawling v. Hoskins*, 132 Pa. St. 617.

² *Gates v. C., M. & St. P. R. Co.*, 2 S. Dak. 422, 50 N. W. 907.

⁴ *Clough v. Hoffman*, 132 Pa. St. 626.

3006. Opening in, unfenced.—It was said a jury perhaps would be warranted in finding that an employer was negligent in leaving a well or elevator hole, which was situated in a dark basement where its servants were obliged to go for many purposes, open and unguarded by a fence or other suitable protection.¹

3007. Guard to gateway on vessel not secured.—Where the stewardess upon a vessel was injured by reason of the railing upon the deck of the vessel giving way because not properly adjusted or put in place by employees who were charged with such duty, its use and purpose being to operate as a sort of gate across the gangway where passengers and freight were received and discharged, and it appeared the railing was so adjusted as to open and close, and when the stewardess was leaning against it, it gave way owing to the failure of such an employee to properly secure it, whereby she fell into the water, it was held that she could not recover; that her injuries were due to the carelessness of her fellow-servant.²

3008. Hatchway of vessel left open.—The rule was not applied, and it was held that the neglect of another employee in leaving a hatchway of a vessel open, whereby an employee was injured, was not the fault of those servants who were employed to furnish and maintain a safe place, but of those engaged with the deceased in making use of a place admittedly safe.³

3009. The exception stated and also applied where an employee was injured by the negligent manner in which a hatch to the hold of a vessel was attempted to be removed, causing it to fall on him while at work therein.⁴

3010. Lumber pile, steps on.—Where a scaler in defendant's employ was injured by the breaking of steps to a lum-

¹Taylor v. Carew Mfg. Co., 140 Mass. 150; Boyle v. Mowry, 122 Mass. 251.

³Barron v. Detroit & C. S. N. Co., 91 Mich. 585, 52 N. W. 22.

⁴Hussey v. Cogger, 112 N. Y. 614.

²Quebec Steamship Co. v. Merchant, 133 U. S. 375.

ber pile, such steps being made by an extension of the boards in the pile at a convenient distance apart, and it was alleged that the servants who constructed the pile had selected for such purpose one board that was weak from defects, it was held, upon demurrer, that the complaint stated a cause of action. The court seemed to consider the case as analogous in principle to those cases where defective ladders and scaffolds are involved; citing *Benzing v. Steinway*, 101 N. Y. 551, and other cases. (In such cases the master is not liable ordinarily if he has furnished sufficient and suitable material and a servant selects such therefrom as may be unfit.)¹

3011. Upon a subsequent appeal it was held the defendant was not liable.²

3012. Masonry for wooden structures insecure.—It was held that a corporation in building a structure composed in part of brick-work and in part of wood-work was not responsible for the fall of the masonry upon a carpenter, whereby he was killed, where due care was employed in selecting the mason and the defect was caused by a mistake in judgment of such mason, who was well skilled in his business. Such carpenter and mason were fellow-servants.

The facts were that the defendant was building a magazine to store ammunition. The mason built an arch for the structure, and, after its completion, he pronounced it safe to remove the props which supported it temporarily, and while so engaged it fell injuring the carpenter.³

3013. Pit in track left uncovered.—Where an employee of a railroad company fell into a pit in the track, while in the act of coupling cars, which was left uncovered by other employees who were or had been making repairs of an appliance located in such pit, it was held that his injuries were caused by the negligence of his fellow-servants in making a place which was safe, unsafe by their negligence.⁴

¹ *Fraser v. Red River Lumber Co.*, Co., 81 Ga. 49, 7 S. E. 166. See 42 Minn. 520, 44 N. W. 878. *Shortel v. City of St. Joseph*, 104

² *Fraser v. Red River Lumber Co.*, 45 Minn. 235. Mo. 114, 16 S. W. 397.

⁴ *Filbert v. Prest. etc. D. & H. C.*

³ *Keith v. Walker Iron & Coal Co.*, 131 N. Y. 207.

3014. Quarry — Unexploded blast.— Where a foreman carelessly placed a workman in a cement quarry to work too near an unexploded blast, the quarry being otherwise safe as such, it was said: The master is not chargeable with the consequences of a place to work made dangerous by the carelessness and neglect of a fellow-servant, though he happen to be the foreman.¹

3015. Staging close to track.— Where the timber of a temporary scaffold which was constructed around a tank for a purpose connected with the repairing of the tank extended so close to the track as to brush a brakeman from the ladder of a passing car, it was held that, in view of the mere fact that the timber was placed there by a fellow-servant of the brakeman, this would not bar his recovery if the company knew it was there, or in the exercise of proper care ought to have known of it. It was further held, in view of the evidence that it was there the day before and was so near to a passing train as to brush the screen upon the cab of the engine, that the defendant was chargeable with notice.²

3016. Triangle on vessel, construction of by mate.— It was held the owners of a coasting vessel were not liable for injuries occasioned a seaman on board the vessel, while in port and in command of the mate, through the breaking of a triangle on which the seaman was sitting scraping the mast, when it appeared they had furnished proper materials for the construction of the triangle, and the injury was caused by the negligence of the mate in constructing it and in ordering the seaman to use it.³

3017. Ties piled temporarily near track, falling of.— Where the plaintiff was one of a gang of men unloading ties from cars and piling them near a side-track, and another gang loaded them on cars on the side-track, different gangs working day and night, and the plaintiff, while pushing a

¹ Cullen v. Norton, 126 N. Y. 1, 26 N. E. 905.

³ Kalleck v. Deering, 161 Mass. 469.

² Texas & P. R. Co. v. Hohn, 1 Tex. App. 36, 21 S. W. 942.

loaded car by one of the piles left standing by the night gang, was injured by the fall of such pile, it was held the company was negligent in failing to adopt reasonable precaution for the protection of the men who were engaged in unloading cars.¹

3018. Vessel, temporary staging for unloading.—Where an employee in unloading a vessel was injured by the insecure manner in which the longshoremen built a staging, which was a temporary means improvised by them for their own convenience, and the claim was made that the master failed in his duty of providing a safe place for work, it was said: But the place which the master furnished was the ship itself, constructed in the usual way, and which became unsafe, not by reason of any carelessness or negligent plan or manner of construction, but solely from the way the longshoremen did their work.²

G. Working in Dangerous Place by Direction of One Without Authority.

3019. Where an inexperienced employee was directed, by one whom the trial court held was without authority from the master, to work at a place used for loading logs on cars, which place was dangerous, and it appeared such employee was thus directed to perform work out of the line for which he was employed, and was injured by being caught between a car and a post or bumper, it was said: An employer is not liable for injuries sustained by an employee in an unsafe and dangerous place in which he was working without any express or implied direction from the employer, even though the same had been done at other times by other employees in the same place. It was also said: We think it was the duty of the company to have some one in attendance on so considerable force of men engaged in a business necessarily

¹ *Texas & N. O. R. Co. v. Echols* N. E. 742. (This case is not reported in the reports of the court of appeals.)
(Tex. App.), 25 S. W. 1087. See 87
Tex. 339, 27 S. W. 60, 28 S. W. 577.

² *Hogan v. Henderson* (N. Y.), 26

somewhat dangerous, to see that employees had reasonable safe places in which to do their work.¹

H. *Offending Servant Acting Under Orders of Master.*

3020. The rule applies if the negligent servant is acting under orders from the master. It was said, however, that a master is liable for injuries resulting from the unsafe condition of the servant's working place, even though that condition is brought about by the negligence of fellow-servants, if they are acting under the master's orders. This was said where a plaintiff was employed to shovel and remove coal from a burning dock, and the superintendent thereafter, and without notifying the plaintiff or his foreman, ordered other men to remove the support of a trestle, so that it fell and injured the plaintiff. It was held that the master was bound to notify him that the risk of the trestle falling was thus made extraordinary; that it was not assumed; that the master was liable.²

3021. Where an employee, working under a bank of earth, was injured by a large mass of earth falling upon him from the top of the bank, which was loosened by other workmen sent by the employer to wedge it down, which orders were given and work done without notice to him, it was held that negligence of the master appeared, and he was entitled to recover.³

I. *When the Work Itself Makes the Place Insecure.*

3022. Rule.—Where a piece of property is out of repair, the men who are employed in making it safe take upon themselves whatever of added risk comes from the existing condition of the place or the work.⁴

¹ *Goff v. Chippewa River & M. R. Co.*, 86 Wis. 237. See SCOPE OF EMPLOYMENT for other cases, 3508 et seq.

² *Northwestern Fuel Co. v. Danielson*, 57 Fed. 915 (C. C. A.). See *O'Connor v. Roberts*, 120 Mass. 227.

³ *Stephenson v. Ravenscroft*, 25 Neb. 678, 41 N. W. 652. See SCOPE

OF EMPLOYMENT for other cases, 3508 et seq.

⁴ *Kennedy v. Spring*, 160 Mass. 203; *Armour v. Hahn*, 111 U. S. 313; *Porter v. Coal Co.*, 84 Wis. 418; *Carlson v. Railway Co.*, 21 Oreg. 450, 28 Pac. 497; *Fraser v. Lumber Co.*, 45 Minn. 235, 47 N. W. 785.

3023. The duty of a master to exercise ordinary care in providing his servants with a reasonably safe place to work does not require him to provide a safe place in cases where the very work upon which the servant is engaged is of a nature to make the place where it is done temporarily insecure, but in such case the servant assumes the increased hazard.¹

3024. Building in process of construction.—The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellow-servants. Hence it was held that a carpenter who was injured by stepping upon a timber which was projecting beyond the face of the wall, not yet secured, could not recover, as there was no negligence.²

3025. There is no obligation on the part of the owner of a building in process of construction to so light it that his employees may see their way in going to and from said building, or from one place to another therein.³

3026. Building undergoing repairs.—An employer is not to be held to a rule which will prevent the possibility of an accident. To have a small hole in the floor, useful for the purpose for which the room is used, and not in the ordinary line of travel, partially unprotected for a few days while changes and repairs are being made, is not evidence of such negligence as would enable an employee whose work was in the room, and who was aware of the changes being made, to recover for injuries sustained by falling into such opening.⁴

3027. Mine, timbering of.—Where a timber-man entered a mine for the purpose of timbering it and making it secure,

¹Gulf, C. & S. F. Ry. Co. v. Jackson, 65 Fed. 48.

²Armour v. Hahn, 111 U. S. 313.

³Murphy v. Greeley, 146 Mass. 196.

⁴Wannamaker et al. v. Burke, 111 Pa. St. 423.

and he was injured by the fall of a piece of lead while so engaged, and it appeared that the work of timbering, on account of the character of the rock and soil, should have been done as the work of excavating progressed, which was not done, and thereby his work was more dangerous than he had a right to anticipate, it was held that the defendants were liable.¹

3028. Where an employee engaged in the work of making an insecure place in a mine secure was killed by the fall of a mass of rock, it was said: It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. But this rule cannot justly be applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, or those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous, safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them.²

3029. Tracks, repairing of.—Where a brakeman employed upon a gravel train, being used for the purpose of hauling and depositing gravel and material to be used in making general repairs, taking up old rails and relaying new, was injured by reason of a box-car jumping the track,

¹Tribay v. Brooklyn Lead Min. Co., 4 Utah, 468, 11 Pac. 612.

²Finalyson v. Utica M. & M. Co., 67 Fed. 507 (C. C. A.).

owing to the bad condition of the track, and the question was as to the defendant's duty in providing a reasonably safe track, it was said: It is argued, in effect, that where servants are employed to put a thing in safe condition and good repair it would be inconsistent and absurd to require of the master to have it in safe condition and good repair for the purpose of such employment; and when the servant has nothing to do with the thing but to repair it the argument is undeniable; but the court states that this is not exactly such a case, but rather the question is, was it the duty of the defendant to plaintiff to have the old track, if so used, in a reasonably safe and suitable condition to perform the service? The duty of a master in respect to the instruments and means furnished to his servants to perform is the same whatever the relation of the service may be — whether it be to repair or to do any other thing. As the defendant required the plaintiff, in the work of distributing materials for the work of repairing the track, to use the old track, it should have been reasonably safe for the purpose.¹

3030. Tracks, repairing of destroyed by flood.— The rule was held not to apply, but it was within the exception, where an employee was engaged at night in tearing up and relaying a portion of a railroad track which had been undermined by high water, and negligence was claimed in that a sufficient number of men were not provided and the ground was covered with obstructions.²

3031. It was said the master's duty to his employees to provide safe places for them to work is a continuing one, and requires him to use ordinary care to keep them safe, and if they became unsafe through his neglect, or are made unsafe through his act, he must answer in damages to a servant who is injured thereby, who is free from contributory negligence. This was said in reference to a bridge rendered unsafe by reason of a heavy freshet, and when an extra force of men were called out to remove a large quantity of

¹Madden v. Minneapolis & St. Louis R. Co., 32 Minn. 303.

²Gulf, C. & S. F. R. Co. v. Jackson, 65 Fed. 48.

accumulated debris which threatened its safety, and while an employee was at work the engine was started causing a rope to break, resulting in the death of such employee.¹

3032. The rule that the master is bound to use reasonable care and skill to furnish his servants safe and suitable instruments and appliances to perform the services in which they are engaged, only applies where such instrumentalities are placed in their hands for use. It has no application to the safety and condition of the thing which the servant is employed to repair. Where a servant is employed to put a thing in a safe and suitable condition for use, it would be unreasonable and inconsistent to require the master to have it in safe condition and good repair for the purpose of such employment. Where a servant is employed to assist in repairing or opening a railroad which is in a dilapidated condition and out of repair, the master does not owe to him the same duty to furnish a safe road-bed as to that portion of the road out of repair as it does to a servant engaged in the operation of trains upon the road in the ordinary course of business, or in riding upon the road in the course of his employment.²

3033. Tracks, construction of.—It was said, however, that it is negligence in a railroad company to leave the spaces between the ties of a railroad track, used for construction purposes, unfilled, and it is responsible for the injury of one of its brakemen caused by stepping between the ties and falling where he was coupling cars in the night-time, and was ignorant of the defect in the track. This was said in reference to a side-track of an unfinished road, though it had been completed beyond this point, and the brakeman was engaged on a construction train running over the completed portion of the road.³

3034. Where a laborer engaged in constructing a road was injured while upon a construction train by reason of

¹ Nall, Adm'x, v. Railway Co., 129 Ind. 260. & U. N. R. Co., 21 Oreg. 450, 28 Pac. 497.

² Carlson v. Oregon Short Line & Gulf, C. & S. F. R. Co. v. Redeker, 67 Tex. 181, 2 S. W. 513.

the spreading of the rails, which defect was due to the manner in which the rails were spiked, one spike only in three ties and none on the fourth, upon a curve, it was said: He assumed greater risk than if passing over a completed road, yet he had a right to expect a degree of care and skill equal to that ordinarily exercised during the progress of railroad construction.¹

3035. Where a laborer engaged with others in repairing a track, the use of which had been partially abandoned, and which had fallen to decay, was injured by the construction train upon which he was riding leaving the track at a crossing, caused by the space along the rails for the flanges to run in becoming filled with mud, the effect of a rain the night before, it was said: While the rule is generally applied that where it is the duty of the employee of a railroad corporation, in the course of his work, to ride over the road, it is its duty to provide a track suitable and sufficient for the purpose and to maintain it in good order, it must be considered with some qualification where the road has become dilapidated and out of repair, and is in the process of reconstruction, in which work the employee is engaged. It was held the risk was one incident to the nature of the employment.²

J. Tracks, Clearing of from Snow.

3036. Dangers from snow-banks are inseparable from the operation of railroads where snow prevails and is removed from the track by snow-plows, and where employees enter the service they assume such risks.³

3037. A railway company is not bound to keep its grounds near its tracks free from ice and snow, and the danger inci-

¹ Colorado Midland R. Co. v. Naylor, 17 Colo. 501, 30 Pac. 249.

² Brick v. Rochester, N. G. & P. R. Co., 98 N. Y. 211. See UNFINISHED ROADS, for other cases; also CONSTRUCTION OF APPLIANCES.

³ Brown v. C., R. I. & P. R. Co.,

69 Iowa, 161; Piquegno v. Railway Co., 53 Mich. 40, 17 N. W. 232; Howland v. Railway Co., 54 Wis. 226; Morse v. Railway Co., 30 Minn. 465, 16 N. W. 358; Bryant v. Railway Co., 66 Iowa, 305, 23 N. W. 678.

dent to such a condition is one of the ordinary risks of a brakeman's employment.¹

3038. Where a jury found that the cause of a switchman's injuries was the accumulation of ice and snow at the side of the track, formed by the melting and freezing of snow left there in cleaning out the flanges of the rails, but did not find that the presence of ice was owing to any negligence on the part of the defendant that rendered it dangerous or unsafe to those operating cars thereon, it was held that it could not be presumed that it was negligence as a matter of law.²

K. Fencing Tracks and Erecting Cattle-guards.

3039. It was said: It is doubtless true that where a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits; but it does not follow that when a duty is so imposed, a violation of that duty exposes the wrong-doer to liability to no person other than those specifically named in the statute. It may well be said that though previously intended for the benefit of one class, it was also intended for the protection of all who need such protection. The purpose of fence laws of this character is not solely for the protection of proprietors of adjoining fields; it is also to secure safety to trains.³

3040. A railroad company, for the safety of its passengers as well as its employees upon its engines and cars, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but a proper track and road-bed, properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if from any want of proper

¹ *Piquegno v. Grand Trunk R. Co.*, 52 Mich. 40, 17 N. W. 232. ² *Orttel v. C. & St. P. R. Co.*, 89 Wis. 127. See MINES AND TRENCHES. *Contra*, *Cregg v. Railway Co.*, 91 Mich. 624, 52 N. W. 62. See, also, ³ *Atchison, T. & S. F. R. Co. v. Reesman*, 60 Fed. 370. *McClarney v. Railway Co.*, 80 Wis. 278.

care such obstructions are permitted to be and come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company upon common-law principles must be held responsible. Independently of any statutory requirement, a jury might find upon the facts of a case that it was the duty of a railroad company to fence its track to guard against such danger.¹

3041. While the failure to fence the road is not, where injury to persons results, as in the case of animals, conclusive of liability, irrespective of negligence, yet an action will lie for personal injury, and this breach of duty will be evidence of negligence. The duty is due (speaking of a municipal ordinance), not to the city as a municipal body, but to the public, considered as composed of individual persons, and each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery.²

3042. In referring to the claim that the provisions of a statute requiring railroad companies to fence their right of way were for the exclusive benefit of land-owners, it was observed: But this is not the theory upon which this statute has been uniformly sustained. While the protection of the property of adjacent proprietors is an incidental object to the statute, its main and leading one is the protection of the traveling public. To insure such protection railroads are imperatively required to fence their tracks, and the penal liability is a matter of legislative discretion.³

¹ *Donnegan v. Erhardt*, 119 N. Y. 468.

² *Hayes v. Railroad Co.*, 111 U. S. 228.

³ *Trice v. Railroad Co.*, 49 Mo. 438. See, also, *Isabel v. Railroad Co.*, 60 Mo. 475; *Barnett v. Railroad Co.*, 68 Mo. 56; *Rutledge v. Railroad Co.*, 78 Mo. 286; *Silver v. Railroad Co.*, 78 Mo. 528; *Rozzelle v. Railroad Co.*, 79 Mo. 349. Compare

Berry v. Railroad Co., 65 Mo. 172; *Harrington v. Railroad Co.*, 71 Mo. 384; *Johnson v. Railroad Co.*, 80 Mo. 620; *Peddicord v. Railroad Co.*, 85 Mo. 160.

It was said these latter cases do not conflict with the doctrine of the former ones. *Atchison, T. & S. F. R. Co. v. Reesman*, 60 Fed. Rep. 370 (C. C. A.).

3043. Where the wording of a statute was that, "until such fences and cattle-guards shall be duly made, every railroad corporation owning or operating any such road shall be liable for all damages done to cattle, horses or other domestic animals or persons thereon, occasioned in any manner, in whole or in part, by the want of such fences or cattle-guards; but after such fences and cattle-guards shall have been in good faith constructed, such liabilities shall not extend to damages occasioned in part by contributory negligence, nor to defects existing without negligence on the part of the corporation or its agents," it was held that the words "or persons thereon" included employees on trains; also, that by the express terms of the statute the defense of contributory negligence was excluded where there was a failure to comply with the statute in the first instance, and that such legislation was within the police power of the state.¹

3044. Where a statute provided that "every corporation constructing or operating a railway shall . . . construct, at all points where such railway crosses a public highway, good, sufficient and safe crossings and cattle-guards, . . . and any railway company neglecting and refusing to comply with the provisions of this section shall be liable for damages sustained by reason of such neglect or refusal, and in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal," it was held that the statute required that such cattle-guards should be so construed as to be sufficient and safe for all the uses and purposes for which the defendant was using it, and that included the use of it by employees engaged in coupling cars, and the danger to them in stepping into it or between the guards.²

3045. It was held, however, that a railway company does not owe its employees the duty of fencing its right of way nor constructing its road with any other grades and curves

¹Quackenbush v. Wisconsin & Minn. R. Co., 62 Wis. 411.

²Ford v. C., R. I. & P. R. Co. (Iowa), 59 N. W. 5.

than it sees fit; that they must be allowed to determine for themselves whether they will fence in all places within their right of way. Section 1289 of the Iowa Code provided for fencing the right of way, and made the company liable to the owner of stock killed for its value.¹

3046. Where a statute provided that "any company or corporation operating a line of railroad in this state, and which company or corporation has failed or neglected to fence said road, . . . shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect," it was held that a fireman who was injured by his train colliding with cattle on the track could not recover under the statute.²

3047. Where a conductor was killed by his train colliding with cattle which strayed upon the track, the right of way not having been fenced, it was held as a matter of law that the company was not liable. This result was placed upon the ground that the plaintiff must have known that the right of way was not fenced and assumed the risk.³

3048. Where, however, an employee was injured in a collision by the train upon which he was working with cattle upon the track, it being alleged that the cattle were thus upon the track through the insufficiency of the fencing of the right of way, it was held that the questions of the defendant's negligence and the assumption of the risk on the part of such employee were proper questions for the jury.⁴

3049. Where the statute required railroads to be fenced and directed the liability of the companies for injury to domestic animals by failure to fence, it was held that this statute was designed to protect trains on railroads at least as much as domestic animals straying upon them; to repeal the common-law rule, and to protect not only the ad-

¹ *Patton v. Central Iowa R. Co.*,
73 Iowa, 306.

³ *Sweeney v. Central Pac. R. Co.*,
57 Cal. 15.

² *Fleming v. St. Paul & Duluth*
R. Co., 27 Minn. 111. See, also,

⁴ *Magee v. N. P. C. R. R. Co.*, 78
Cal. 430.

1 Redfield on Railways, 492.

joining land-owners, but the public generally. (The statute in question was wholly different from the statute considered in *Quackenbush v. Railway Co.*, 62 Wis. 411.)¹

3050. The several sections of the Texas statute relating to fencing fields and constructing cattle-guards (sections 4240, 4241, 4242, 4243, 4244) construed, and held that the only purpose had in view by the law in the construction of cattle-guards is to protect inclosures. The law does not require railroads to be fenced, nor does it require cattle-guards to be put in merely because they have been fenced. The liability to injury caused by coming in contact with animals trespassing upon the road is one of the dangers incident to the operation of railroads, and may be encountered inside of inclosures having cattle-guards as well as outside.²

L. *Duty Personal to Master.*

3051. Personal duty.—The duty of the master to provide for and maintain for his servant a reasonably safe place to work is one that is personal to the master, and the performance of which he cannot delegate to another so as to exempt himself from the responsibility for the manner in which it is performed.³

NOTE.—The rule as to defects and repairs is not uniform in the courts of all the states, some holding the duty a personal one, others holding that when suitable materials and competent servants are provided the measure of the master's duty is met. See *APPLIANCES, DEFECTS*, for the rule in the several jurisdictions. The cases given here are such only as bear directly upon the subject of safe place to work.

¹ *Curry v. C. & N. W. R. Co.*, 43 Wis. 665.

² *Ward v. Bonner et al.*, 80 Tex. 168, 15 S. W. 805. See *ASSUMED RISK*, 584 et seq.; *CONTRIBUTORY NEGLIGENCE*, 1301 et seq.

³ *Bessex v. C. & N. W. R. Co.*, 45 Wis. 477; *Hulehan v. G. B. W. & St. P. R. Co.*, 58 Wis. 319; *Same Case*, 68 Wis. 520; *Swoboda v.*

Ward, 40 Mich. 420; *Vandusen v. Letellier*, 78 Mich. 502, 44 N. W. 512; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Rogers v. Leyden*, 127 Ind. 50; *Taylor v. Railway Co.*, 121 Ind. 427; *Cincinnati, etc. R. Co. v. Lang*, 118 Ind. 579; *H. & T. R. Co. v. Marcellus*, 59 Tex. 334.

3052. The duty of the master in reference to the road-bed and track he furnishes his employees to pass over is of this class.¹

3053. The mining boss, whose duty it was to keep the mine in a reasonably safe condition, does not represent the personal duty of the master as to such work. He is a fellow-servant with the operatives.²

3054. The master's duty is met when he commits the work to competent and skilful bosses, who conduct the same to the best of their skill and judgment.³

3055. In an action where the negligence claimed was an insufficient floor, which broke while moving a heavy machine on trucks, it was said: No doubt the defendant was required to use proper care in order to see that the floors were of sufficient strength to support any machine which it was necessary to move over or on them. But the nature of the care he was bound to use was such that the defendants might have performed their full duty by employing suitable persons of competent skill and experience, whose business it was to keep the floors in such condition as to repair that they were fit and safe for use for any purpose for which it might become necessary to appropriate them. If it was diligent and careful in this respect, and any want of repairs had not existed so long a time as to show absolute negligence on the part of the defendant, then the accident would have been attributable to the negligence of an agent and servant in the service of the common employer with the plaintiff.⁴

¹ *Gulf, C. & S. F. R. Co. v. Johnson et al.*, 1 Tex. App. 103, 20 S. W. 1123, citing *Railway Co. v. Dunham*, 49 Tex. 189; *Railway Co. v. Geiger*, 79 Tex. 13, 15 S. W. 214. See, also, *Galveston, H. & S. A. R. Co. v. Daniels*, 1 Tex. App. 695, 20 S. W. 955.

² *Waddell v. Simoson*, 112 Pa. St. 567; *Coal Co. v. Jones*, 86 Pa. St.

432; *Canal Co. v. Carrol*, 89 Pa. St. 374.

³ *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577; *Waddell v. Simoson*, 112 Pa. St. 567; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364. See, also, *Del. & Hudson Canal Co. v. Carroll*, 8 Norris, 374.

⁴ *Cooper v. Hamilton Mfg. Co.*, 14 Allen, 193.

3056. An employee in a lumber-yard, while pushing a hand-car along one of the tracks, was injured by falling into a ditch which had been dug across the track the day before under the direction of the foreman. The employee was unaware of the existence of such ditch and could not see it while pushing the car. It was held the act of such foreman rendered the place of work of such employee unsafe, and consequently the master was liable.¹

3057. If the injury results to the servant from the direct act or negligence of the master, or where he is personally present superintending the work and giving orders, he is answerable for the damages to the same extent as if the relation of master and servant did not exist.²

M. Notice Required of Defects.

See **APPLIANCES, DEFECTS**, for cases which involve the rule. Those given here bear only upon the question of a safe place to work.

3058. Rule.—If a servant claims damages from the master for injuries received on account of defective premises, buildings, machinery or appliances, he must allege and prove that the unfitness or defect which caused the injury was known to the master.³

3059. To charge the master the danger should be such as to suggest itself to a man of ordinary prudence. Hence it was held, where a plank used to make an easy ride over a sill had become so worn as to leave a jolt of half an inch rise, over which the wheels of a truck had to pass, that it could not be said there was negligence in leaving such a slight obstruction.⁴

¹ *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. 598.

² *Lorentz et al. v. Robinson*, 61 Md. 64; *Baxter v. Roberts*, 44 Cal. 187; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Harrison v. Central R. Co.*, 31 N. J. L. 293; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467.

³ *Pittsburg, C. & S. L. R. Co. v. Adams*, 105 Ind. 151. For other cases in support of this rule see **APPLIANCES, DEFECTS**.

⁴ *Nelson v. Allen Paper Car Wheel Co.*, 29 Fed. 840.

3060. Where the lessor of premises employed a workman to clean an oven recently rebuilt by the lessor, and such workman while engaged in the oven in the act of cleaning it was injured by the oven falling on him, it was held, in an action against his employers, that no recovery could be had unless it was made to appear that he had knowledge of the danger or was negligent in not obtaining it; and as there was no proof that they knew or had reason to suspect the oven was defectively constructed, the action could not be sustained simply upon the ground that the oven proved defective.¹

3061. Where an employee was injured by lumber from a pile falling upon him, it was said: If the lumber was safely piled in the first instance, but it subsequently became unsafe by the removal of lumber from the pile, it must appear that the defendant through some responsible officer or agent had actual notice of the defect, or that it had existed for so long a time that the defendant should have discovered it in the exercise of reasonable diligence.²

3062. The mere fact that a superintendent ordered a workman to drill a hole for blasting where an unexploded charge was already in, in the absence of evidence that the superintendent could by proper diligence have known the previous charge remained unexploded, is not sufficient to sustain a claim of negligence.³

3062a. Where a brakeman was injured by the derailing of an engine caused by a rock on the track, and it appeared the road was at that point laid through a rocky and mountainous region, and there was no direct proof as to the location of the rock before it fell, or no direct proof as to the place from which it fell, and no specific act or omission that might be negligence was shown, it was held that it was error to refuse a nonsuit.⁴

¹ Nason v. West, 78 Me. 253.

34, 13 S. E. 953. See APPLIANCES,

² Baldwin v. St. Louis, K. & N. W. R. Co., 68 Iowa, 37.

360 et seq., 391 et seq.

⁴ Denver & R. G. R. Co. v. Mc-

³ Houston v. Culver et al., 88 Ga. Comas (Colo.), 42 Pac. 676.

3062b. To charge the owner of a mine with liability for the death of an employee caused by rock falling from the roof, it must appear that the owner had previous knowledge of the defective condition of the roof or was negligent in not discovering it.¹

N. Notice Presumed.

3063. It was held that evidence showing a depression in the track had existed for three days, and was known to the section-boss, was sufficient to charge knowledge thereof upon the company, and to sustain a verdict on that ground in favor of an engineer who was injured by the derailment of his engine, claimed to have been caused by such defect in the track.²

3064. Where water suddenly rising in a storm caused the rails laid upon a bridge or its approach to be loosened by the action of ice, whereby an engineer was killed, and it appeared that a section-boss had examined the bridge a few hours before, and should have been impressed from what he observed that there might be danger, it was held that the company was chargeable with negligence in not making a more frequent patrol of the bridge.³

3065. Where an employee engaged in the work of repairing a tunnel was injured, caused by the insufficiency of the braces, and the place was known to be thus insecure to the defendant's foreman, it was held the servant was entitled to recover.⁴

3066. Notice to a railroad company that cars passing over a certain place in its tracks had a jumping or jarring motion would not tend to show notice to it of a latent internal seam in a rail at that place, which subsequently caused the rail to split and break, there being no evidence that the

¹Cherokee & P. C. & M. Co. v. Britton (Kan. App.), 45 Pac. 100.

²Worden v. H. & S. R. Co., 76 Iowa, 310.

³Scagel v. C., M. & St. P. R. Co., 83 Iowa, 380.

⁴Louisville, N. A. & C. R. Co. v. Graham, Adm'r, 124 Ind. 89.

motion of the cars was caused by or was suggestive of the latent defect in the rail.¹

3067. In an action against a railroad company for the negligent killing of an engineer, occasioned by the overturning of his engine through the sinking of the track at a fill, evidence that some weeks previous the track having sunk a few inches had been repaired, and was in the opinion of experts the best part of the road; that on the morning of the accident the track was twice inspected by the track-walker; that two heavy freight trains had passed over it in safety; and that there was a very heavy rain-fall at that place which made the earth soft and yeilding, it was held there was not sufficient to show any negligence on the part of the company. That to hold the company liable would be to hold it responsible for the act of God.²

3068. The jury were permitted to determine as to a defect in the track at a switch, where it was alleged that the outer rail of a curve was not sufficiently raised above the other, and that the split rail of a discontinued switch, which had been spiked, was loose and out of line with the succeeding rail, and where there was evidence to the effect that it had been in such condition for some time. It was said: Such defects, when they do happen, do not at once fasten a liability on the railroad company. It is only after they have existed long enough for diligent supervision to discover and remedy them that liability attaches. If they exist and are sufficiently patent to be discovered by careful inspection, the longer they are permitted to remain the greater the negligence.³

3069. Under the Alabama Code, section 2590, an employer must have a reasonable time to remedy a defect after discovery, and a jury should be instructed as to this point where it arises in the case.⁴

¹James v. Northern Pacific R. Co., 46 Minn. 168, 48 N. W. 783.

²Binns, Adm'r, v. Richmond & D. R. Co., 88 Va. 891, 14 S. E. 701.

³Kansas City, M. & B. R. Co. v. Webb, 97 Ala. 157, 11 So. 888.

⁴United States Rolling Stock Co. v. Weir, 96 Ala. 396, 11 So. 436.

3070. Where an employee about defendant's round-house was injured by the falling of a long heavy door upon him, caused by the attachments which held it and by means of which it was moved becoming defective and out of repair, and it appeared that such defective condition of such attachment was known to the defendant's master mechanic, who was in charge and who had authority in the premises to hire and discharge hands twenty-four hours prior to the injury to the plaintiff, it was held that whether a reasonable time after such knowledge by such master mechanic of the defective condition of the attachment had intervened prior to the accident to cause the defect to be remedied was a question of fact for the court, and it was not error on the part of the trial court to find that twenty-four hours was such reasonable time. It was further held that knowledge on the part of such master mechanic was chargeable to the master, upon the ground that such agency and power which he possessed constituted him a vice-principal.¹

3071. A railroad embankment which had stood for thirty years without any difficulty occurring at that point gave way after a sudden and unprecedented rain-fall. The road-master had sent men to a point two miles distant where trouble might be anticipated. The rain-fall occurred within two hours prior to the accident to a train, by which the plaintiff, an employee, was killed. The defendant had no actual notice of the defect thus occasioned. It was held that it was a question of fact for the jury to determine whether the company was chargeable with negligence in not knowing of or discovering the defect in time to have warned the plaintiff.²

3072. An employer who has had ample opportunity to discover a defect in an appliance, and who failed to repair it within a reasonable time, is liable in damages to an employee who is injured by reason of its defective condition while in

¹ *Missouri Pacific R. Co. v. Sasse*
(Tex. App.), 22 S. W. 187.

² *Central Railroad & Banking Co.*
v. Kent, 84 Ga. 351, 10 S. E. 965.

the performance of his duties; and this rule was applied to a bridge across a trench from which the barriers had been removed for some days.¹

3072a. The fact that a rock fell from a place where the operator had been blasting, injuring one of the employees, together with evidence that a prudent examination would have disclosed the defect and danger, is sufficient *prima facie* to establish negligence.²

¹ *Bennett v. Standard Plate Glass Co.*, 158 Pa. St. 120. See *APPLI-* *ANCES*, 360 et seq., 391 et seq.; *EVI-* *DENCE*, 1625 et seq.

² *Perry v. Rogers*, 91 Hun, 243.

CHAPTER XVI.

PROMISE TO REPAIR OR REMEDY DEFECTS.

- A. *Rule*, 3073 et seq.
- B. *Incidents of Application of Rule*, 3077 et seq.
- C. *Complaint Not Made on Behalf of Injured Servant — Effect of*, 3097 et seq.
- D. *Promise to Another*, 3101.
- E. *Rule Does Not Extend to Simple Appliances*, 3102 et seq.
- F. *Continuing in Service an Unreasonable Time After Promise — Effect of*, 3106 et seq.
- G. *Where Danger is Imminent the Promise May Not Excuse the Servant*, 3117 et seq.
- H. *Promise Must be by One with Authority*, 3126 et seq.

A. *Rule.*

3073. Where the servant, having the right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances by the master that the dangers shall be removed, such assurances remove all ground for holding that the servant by continuing in the employment engages to assume the risk.¹

3074. If machinery upon which a servant is employed becomes dangerous, and the servant has complained of it and has been promised that it would be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he was using due care in working when he knew there was danger. "But no case," say the court, "we believe, has gone the length of deciding that the promise entitled

¹Stephenson v. Duncan, 73 Wis. 26 N. E. 1086, 140 Ill. 59, 29 N. E. 706; 404; Roux v. Blodgett & Davis Lum- Indianapolis & St. Louis R. Co. v. ber Co., 94 Mich. 607, 54 N. W. 492; Watson, 114 Ind. 20. Joliet, A. & N. R. Co. v. Velie (Ill.),

the servant to recover as matter of law." If the time for performance has gone by before the accident and the servant knows the repair has not been made, there is a very strong argument that the servant is no longer relying upon the promise, but has decided to take the risk.¹

3075. If a servant, upon discovering or being informed by others of a danger arising from a defect in the machinery he is working with, which defect his previous want of experience with machinery (which want his master was acquainted with at the time of the employment) did not enable him to understand, applies to the master, or his recognized agent over the machinery, to have such defect remedied, who promises to make the defect good, he may remain in the service without losing his right of action against the master for injury resulting from that defect, if in the meantime he observe that reasonable care to protect himself against such injury which ordinarily prudent men take of their persons when employed in a dangerous service of like nature; that is to say, if the defect increases the danger of service, the circumspection or caution of the servant with reference to his safety of person must be increased in proportion to the increase of danger. If the defect be not remedied within a reasonable time, the servant from the end of that time is in the same situation precisely as if he had known of the defect in the first instance; that is, he would be held to take the risk of it, if he chose to continue in the service.²

3076. Mere suspicions and surmises or belief that the defects will be remedied do not take the place of a promise to

¹ Counsel v. Hall, 145 Mass. 468.

² Foster v. Pusey, 8 Houst. (Del.) 168, 14 Atl. 545. It was further said in the foregoing case, "whether an actual promise to repair the defect is made or not, yet, as the master's duty is to provide safe machinery for the servant to work with, notice of the fact that the machinery

is defective, and therefore dangerous, is sufficient to require the performance of that duty, and the servant would be justified in relying upon the belief that it would be done to the same extent as though an express promise to do it were given." This is not sustained by authority.

remedy them. There must be something emanating from the employer to induce a belief that the defects will be remedied.¹

B. Incidents of Application of Rule.

3077. Where, however, an employee made complaint to a millwright in respect to the defects and dangers connected with certain machinery (what they were the case does not disclose), it was held, after stating the general rule, that a servant, in complaining of defective instrumentalities or machinery to the master, is not required to state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if from the circumstances and the conversation it can fairly be inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of such promise.

(No question seems to have been raised as to the authority of the millwright in the premises.)²

3078. Where a servant, knowing machinery which he is operating to be so defective as to render its use dangerous, simply protests against its use, and after protest, having received no assurance that the defect will be remedied, continues to use it, the servant assumes the risk incident to the use of such machinery, for his remaining in the service is voluntary. Protest against or objection to a service rendered dangerous by defective machinery, if the party making the protest or objection is under no legal obligation to remain in the service, cannot render the service subsequently performed involuntary.

The facts were that an employee was injured by an engine, which at the time was without a pilot, becoming derailed from collision with cattle on the track. It appeared

¹ McKelvey v. Chesapeake & O. Con. Mill Co., 57 Minn. 461, 59 N. W. R. Co., 35 W. Va. 500, 14 S. E. 261. 531.

² Rothenberger v. Northwestern

the employees protested against going with the engine in that condition, and were told that if they did not go some others would be secured that would, which they construed as implying their discharge from the service if they refused.¹

3079. An employee who remains in the service after notice of a defect augmenting the danger assumes the risk as increased by the defect, notwithstanding he may object or complain, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent the exception cannot exist.

This rule was stated and applied where the complaint was that a light was not furnished a watchman in a freight yard, and it appeared that such a light was essential for the safe performance of his work, that it was the master's duty to have furnished one, which was known to the employee, and he had complained of the danger and demanded that the light be provided.

It was further said: The rule absolving the servant from the assumption of risks is an exception to the general rule, for the general rule is that the servant does assume all the ordinary risks of the service he enters. There must therefore be some ground for the exception, and the only solid ground that can be found is the inducement held out by the mere agreement of the master. If this be not so, then an employee at his first entrance into service might object and protest and successfully claim that he is exempt from the perils of the service.²

3079a. Where an experienced employee, while moving a derrick on loose planks laid across the girders of a building in process of erection under direction of his foreman, attempted to change the direction of the derrick by using a crowbar, standing with one foot on the planks and the other braced against the girder, and while in such position slipped

¹ G., H. & S. A. R. Co. v. Drew,
59 Tex. 10.

² Indianapolis & St. Louis R. Co.
v. Watson, 114 Ind. 20.

and fell, causing him injury; and it was alleged that the foreman had promised additional planks for use; and the court having found that his fall was not occasioned by the insufficiency of the number of planks, but was the result simply of a miscalculation on his part as to his position and his feet accidentally slipping from the girder, it was said that the facts did not bring the case within the rule relating to the effect of a promise on the part of the master to remedy a defect, first, because the plaintiff testified that he did not think he was in a dangerous position; second, as he had no promise covering this risk, it follows he was not induced to remain in the service relying upon the promise, so far as the real cause of his injury was concerned.¹

3080. An employee who continues to use a machine which he knows to be dangerous takes upon himself the risk of any accident that may result therefrom; but that principle has its qualifications, one of which is, that if the employee in pursuance of the promise of his employer to remedy the defect, and the risk is not such as not to threaten immediate danger, continue in his employment and be injured without fault on his part, the employer may be liable.

This rule was applied where it appeared that an engineer who was too short to reach the crank-pin of his engine readily was injured in such an attempt, and his employer had promised to build him a platform if he would continue the employment.²

3081. Where rollers in a flouring mill became clogged owing to a defect therein, and a miller in the employ of defendant attempted to clear them while in motion, and was injured, and it appeared he had complained of their condition and had been assured the defect would be remedied, and it also appeared that he had been assured that the electric light would be continued until morning, such not having been the custom, and his injuries were received while

¹Holloran v. Union Iron & Foundry Co. (Mo.), 35 S. W. 260. ²Brownfield v. Hughes, 128 Pa. St. 194.

the mill was dimly lighted by gas, it was held that he was not guilty of such negligence as would prevent his recovery for such injuries against his employer.¹

3082. Where gearing in a saw-mill was covered at the time of the servant's employment, but subsequently the covering became broken, exposing the gearing, and, the attention of the foreman having been called to it, he promised to repair it, and told the employee to continue his work for a short time when the repairs would be made, and the servant did so in reliance upon such promise, and was within a short time thereafter injured by coming in contact with such gearing, it was held that the risk was not assumed; that the promise of the master waived it.²

3083. The rule was held not to apply to an experienced employee using a machine which might have been made more safe by the addition of contrivances to suspend motion while his hands were exposed to danger, which contrivances the employee had requested to have attached before he commenced work and which the machinist promised to have done as soon as he had time. The superintendent, however, told him at that time and at other times when similar request was made, in substance to go ahead and be careful, and if he did not care about doing it to get out. It was said: It cannot be said there was any connection between the conversation had by the plaintiff and the superintendent and machinist, and the continuance of the plaintiff in the defendant's employment. There was no inducement offered him to take the risk. A threat to discharge an employee is not coercion.³

3083a. A freight conductor requested a workman in the repair-shop of the company to replace a hand-rail on a way-car. The rail had been removed at the suggestion of such

¹Stoutenburgh v. Dow, Gilman-Hancock Co., 82 Iowa, 179.

²Roux v. Blodgett & Davis Lumber Co., 85 Mich. 519, 48 N. W. 1092; Same Case, 94 Mich. 607, 54 N. W. 492.

³Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520. See, also, Wilson v. Winona & St. P. R. Co., 37 Minn. 326, 33 N. W. 908; Alexander v. Tenn. etc. Mining Co. (N. Mex.), 3 Pac. 735.

conductor because it had become damaged. The workman, in substance, said he would repair it. The conductor, before the workman could repair it, started off with the car. The superintendent, noticing the defect, called his attention to it and directed him to get it fixed. He again told the workman to repair it. The workman promised he would but neglected to do it. The conductor was killed, due, as was alleged, to the absence of such railing. It was held that the facts did not bring the case within the rule applicable to a promise to "remedy a defect." No one representing the master had induced such conductor to continue the use of the car in its defective condition. The company might have been negligent in not repairing the car sooner, but such negligence was open to the observation of such employee and he saw fit to use the car. He made no objection to using it, and gave no notice to any one in authority which would indicate to defendant that he refused to take the risk, which was as apparent to him as to any one connected with the road.¹

3084. The rule was applied where a blacksmith who was working with an incompetent helper was assured by the foreman over him, who had authority to engage and discharge blacksmiths, that a suitable person would be employed in the place of such incompetent person as soon as he could be obtained.²

3085. Also where a boy was killed while working on a dangerously narrow platform, and it appeared his father had complained to the superintendent of the danger and had only refrained from removing his son by the promise of the superintendent that another workman should be substituted in the boy's place.³

3086. Also where an employee engaged in clearing the track of a road from snow objected to working at night

¹ Shackelton v. Manistee & N. E. v. Northern Pacific R. Co., 39 Minn. R. Co. (Mich.), 64 N. W. 728. 15, 38 N. W. 632.

² Wust v. Erie City Iron Works, ³ Madara v. Pottsville Iron & Steel Co., 160 Pa. St. 109. 149 Pa. St. 263. See, also, Lyberg

on account of the severity of the weather, and was assured by a vice-principal that there would be cars into which he could go and protect himself if the cold became intense, which assurance was not made good, and as a result the servant sustained injury by the freezing of his feet.¹

3087. Also where a promise was made by an employer that he would furnish a sufficient number of men to properly and safely conduct the work. It appeared a conductor was injured while doing work that properly belonged to a brakeman to perform, but which he was obliged to do because a sufficient number of men was not employed on his train, and the superintendent had promised to give him another man in a few days or after a little.²

3087a. Where a mill was being operated at night, incandescent lights being used, and it appeared that the sawyer was injured by the saw striking a piece of iron driven into a log, evidently done by some malicious person; that the light by spells was poor, or, as expressed, would go down; that this was due to the negligence of the fireman in keeping up steam; that it was known to the general manager that the light was poor at times; that upon receiving notice from the sawyer of the imperfection in the light, he stated he would look after it, he would see that the lights are better; and upon complaint being made to a night foreman (it not appearing he had any authority in the premises) by such sawyer, who stated if the lights were not made better he would quit, and such foreman replied, "they are going to make them better," and it was alleged that the imperfection in the lighting was the proximate cause of the injury, as otherwise the plaintiff would have seen the iron in the log, it was held that it was a question for the jury whether the plaintiff assumed the risk of injury from imperfect light, as well as the reasonableness of the time he continued in the employment after the promise.³

¹ Hyatt v. H. & St. J. R. Co., 19 (Ill.), 26 N. E. 1086, 140 Ill. 59, 29 Mo. App. 287.

² Joliet, A. & N. Ry. Co. v. Velie

³ Smith v. E. W. Backus Lumber Co. (Minn.), 67 N. W. 358.

3088. Where boards placed between the rails of an inclined tramway on which cars ran at a coal-hoist gave way from under an employee while he was engaged in the line of his employment, from being insecurely fastened, causing him injury, and it appeared he had discovered the condition of the track two or three days before and reported the same to his superior officer, who assured him that he would make proper repairs, but could not do everything at once, it was held that the servant relying upon such promise could not be said to have assumed the risk of continuing in the employment.¹

3089. The rule was applied where the servant was injured in the use of a defective delivery wagon, and the promise on the part of the employer was that after a short time he would discontinue its use, requesting the servant to continue until such time. It was said that no distinction could be made in principle from a promise to discontinue the use of a defective instrumentality and a promise to remedy a defect therein.²

3090. Also to a section-man engaged in breaking stone with a hammer, the handle of which was defective, and where the foreman had promised to have a new one in a few days, and told him to continue the work until such time.³

3091. Where a workman had notified the defendant of defects in machinery, and the defendant had promised him that at the earliest possible time the mill should be so arranged that there would be no more need of the machine, and had specially requested him to continue operating it until such change could be made, which would be in a very short time, and on the morning of the day of the accident the defendant informed him that it would be necessary to clear away the accumulations under the machine or to repair it, as it would not be used after that day, and the plaintiff

¹ Conroy v. Vulcan Iron Works, 62 Mo. 35.

³ Southern Kan. R. Co. v. Croker, 41 Kan. 747, 21 Pac. 785.

² Schlitz v. Pabst Brewing Co. et al., 57 Minn. 303, 59 N. W. 188.

iff continued in the service wholly on account of and relying upon defendant's promise, and in daily expectation of being relieved from operating the machine, it was alleged that a complaint alleging these facts was sufficient.¹

3092. Where it was claimed that a general foreman over the loading of a ship promised the workmen, prior to going to work in the hold of the vessel, that a hatch-tender would be stationed at the hatchway to warn them when bales of cotton were about to be thrown into the hold, and that one of them, relying upon this promise, obeyed the order of such foreman to go into the hold and work, and that no such person was placed at the hatchway, it was said that if such promise was given, and the employee suffered injury from such source, the master would be liable, provided the employee did not know or had no reason to suppose that it was about to be thrown down. If, however, a hatch-tender was duly stationed, but afterwards absented himself without the knowledge of the foreman, his absence would be the negligence of a fellow-servant.²

3093. An engineer was injured in a collision in being caught between the engine and the tender. It appeared that the "chafing irons," when he started upon the trip, were partly broken off; that the engineer reported the fact on the repair-book to the foreman of the round-house, whose duty it was to have the repairs made and direct what engines should go out. On returning to go out with his train he found the engine out but not repaired. On inquiring of the foreman why the repairs had not been made, the reply in substance was that he had not had time. On plaintiff suggesting that he did not like to take out this engine, that it was not safe, the foreman replied that he was short of engines to do the work on the road and had no other to send out, and added: "Proceed with that and you can get it fixed at Albert Lea if you have time; if not I will remedy it when you get back."

¹ *Snowberg v. Nelson-Spencer Paper Co.*, 43 Minn. 532.

² *Cheaney v. Ocean S. S. Co.*, 92 Ga. 726, 19 S. E. 33.

It was assumed that the defects in the chafing-irons caused the engine to override the tender, and it was said that it did appear that it was liable to break in two at any time, but there was nothing conclusively showing that this would have placed plaintiff in any special danger.

It was held that the engineer's knowledge of the defects did not, under the circumstances, charge him with the assumption of the risk, and that the following rule was applicable: "Where a servant who has knowledge of defects in the instrumentalities furnished for his use gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it; under such circumstances his subsequent use of the defective instrumentality would not necessarily, or as matter of law, make the servant guilty of contributory negligence, but it would be a question for the jury whether, in continuing its use after he knew of the defect, he was in the exercise of ordinary care."¹

3094. Where an employee was injured, as was claimed, by defects in a hand-car, and there was evidence tending to show a promise on the part of the foreman in charge of the work to have the defect repaired, and that the injury to such employee was without fault on his part, it was said: While it is true that an employee by virtue of his employment assumes all the ordinary risks incident thereto, he is not required immediately upon the discovery of defects in tools or machinery to quit work and leave his employment, unless the danger from such defects is so imminent as to make it gross carelessness or recklessness for him to

¹Green v. Minneapolis & St. L. R. Co., 31 Minn. 248.

continue therein. Where no such danger is apparent and the employee is justified in believing that the defect will soon be remedied by his employer, he may continue in his employment for a reasonable time after acquiring knowledge of the danger.¹

3095. The general rule was applied where a boy fourteen years old was injured by the falling of a steam hammer while he was placing under it an article to be struck, the fall being caused by a defect in the machinery to which the plaintiff had previously called the attention of defendant's foreman, who had told plaintiff to go on and finish the job and he would bring him a pair of tongs so that plaintiff need not put his hand under the hammer, but failed to furnish the tongs.²

3096. Where the promise was to repair an engine sometime, and meantime the engine was being employed from day to day with knowledge that the repairs were not made, it was said: Where there is a promise to repair immediately or within a fixed time, and a party relies upon its having been done, and is injured because of such reliance, he has a right to complain; but this is not such a case. The promise was wholly indefinite, and plaintiffs never relied upon it except as a probable future event. They knew the repairs had not been made when they employed the engine on the day of the fire, and they deliberately and most carelessly took the risks of what actually happened. The injury was to property, not to an employee.³

3096a. An employee was held to be relieved from an assumption of the risk from the use of a lantern giving imperfect light, where five days before his injury he was promised by the conductor under whom he worked that a suitable lantern should be immediately furnished.⁴

¹ Atchison, T. & S. F. R. Co. v. Midgett (Kan.), 40 Pac. 995.

³ Marquette, H. & O. R. Co. v. Spear et al., 44 Mich. 169.

² Chicago Drop Forge & Foundry Co. v. Van Dam, 149 Ill. 337, 26 N. E. 1024.

⁴ Atchison, T. & S. F. R. Co. v. Lannigan, 56 Kan. 109.

3096b. A promise of the master to repair a hanging door was held not to relieve the employee to whom made from an assumption of the risk, where he fully knew the condition of the door and appreciated the danger incident thereto.¹

*C. Complaint Not Made on Account of Injured Servant —
Effect of.*

3097. It was said if an employee complains to an employer, but not on his own account, of the defective condition of premises on which he is employed, and upon assurances, which do not induce him to remain, that the defect will be remedied, continues in the employment with full knowledge of the risk, and is injured by reason of such defect, he must be taken to have assumed the risk, or not to have been in the exercise of due care, and cannot recover from the employer for his injuries. It was so held where an employee operating a draw-bridge was injured through the defective condition of planks upon one of the piers. He had complained generally to the superintendent that the planking was defective and that unless repaired some one would get hurt, and the superintendent had promised to repair it.²

3098. Where a section foreman was injured by his foot getting caught by a broken tie bulged or sprung up in the track as he was riding on his hand-car, and it appeared he had reported the general defective condition of the track to his superior, who had promised to furnish materials to repair the same, but had not done so, and that the foreman did not complain on his own account, not anticipating any danger to himself in doing the work, it was held that the effect of the promise was to relieve him from an assumption of the risk.³

3099. Where a train-master complained to a yard-master of the latter's slowness in making up trains, and he explained

¹ Conley v. American Express Co., 87 Me. 352.

³ Gulf, C. & S. F. R. Co. v. Donnelly, 70 Tex. 371, 8 S. W. 52.

² Lewis v. New York, etc. R. Co.,
153 Mass. 73.

the work could not be done more rapidly with only an engineer on the engine, and the train-master replied that he would see to getting a fireman at once, it was said that such reply, if in the nature of a promise, did not relate to any danger to which the yard-master was exposed, nor had the yard-master made any complaint on his own account. The promise was made to further the master's business, and for his benefit, not as a means of protection to the servant.

An attempt is made to distinguish *Railroad Co. v. Donnelly*, 70 Tex. 371, 8 S. W. 52. It is stated that the latter case was not decided upon the doctrine applicable to the present subject, but on the ground that the master was not chargeable with notice of the defect that caused the injury.¹

3100. Where a section foreman told employees on his section that the company had promised to send new tools in place of those in use, known to be defective, it was held that the promise inured to the benefit of all employees on the section in whose hearing and presence it was made.²

D. *Promise to Another.*

3101. Where the engineer of a locomotive had notified the defendant's superintendent that the air-brake was out of order, and the superintendent through the engineer had ordered a repairer to put it in order, but the repairer had neglected to do so, and in its use a collision occurred between such engine and box-cars upon a side-track, which was found to be attributable to the defect in the air-brakes, and also to the negligence of the engineer, by which the fireman was injured, it was held that such assurance (though it does not appear in the printed case that the foreman knew of or relied upon such assurance) removed all ground for the argument that the servant, by continuing the employment, assumed the risk.³

¹ *International & G. N. R. Co. v. Turner et al.*, 3 Tex. App. 487, 23 S. W. 146.

² *Atchison, T. & S. F. R. Co. v. Sadler*, 38 Kan. 128, 16 Pac. 46.

³ *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. 725 (C. C. A.).

E. Rule Does Not Extend to Simple Appliances.

3102. Where it was the duty of servants to move a box of considerable weight a distance of five feet from one car to another, and it appeared that the plaintiff, one of such servants, had asked for and had been promised skids whereon to slide such box, it was held that the failure to furnish such skids was not negligence. It was said: Where a servant is employed to perform a simple act of manual labor, the risks of which are obvious, he cannot escape from the assumption of those risks by proof that the master promised to furnish him tools by the use of which his work could be done in a different way or more conveniently, or even more safely, if it could be done with reasonable safety without the tools.¹

3103. A master is not liable to a servant of mature years and ordinary mental capacity who is injured in his employ by reason of a defect in a ladder of which he was aware, though the servant had notified the master of such defect, and was told to use the ladder until another was furnished. The rule exempting an employee from an assumption of the risk in case of a promise to remedy the defect is designed for the benefit of employees engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar.²

3104. Where a brakeman notified the railroad company that a lantern furnished him was defective and liable to go out at any time, and the company promised to supply him with a new lantern in a short time, and directed him to go on with his work, it was held that he did not by continuing work assume the risk of danger from the defective lantern, unless the danger was so imminent that no one but a reckless person would continue in the service.

¹ *Gowen v. Harley*, 56 Fed. 973 21 Pac. 785; *Schlitz v. Brewing Co.*, (C. C. A.). See, however, *Southern* 57 Minn. 303, 59 N. W. 188.

Kan. R. Co. v. Croker, 41 Kan. 747, ² *Meador v. Lake Shore & M. S. R. Co.*, 138 Ind. 290, 37 N. E. 721.

The jury having found that the plaintiff knew the lantern was defective and dangerous; that it was accustomed to go out in its ordinary use; that the danger from it was great, apparent and continuous while being used in coupling cars, and that an ordinarily prudent man would not continue to use for coupling cars a lantern the light of which in its ordinary use for such purpose had continuously been accustomed to go out, it was further held that such findings were not in irreconcilable conflict with a general verdict for the plaintiff, where there is an express finding that there was no evidence that the lantern ever before went out while being used in coupling cars.¹

3104a. The rule that a promise to remedy a defect may relieve a servant from the assumption of the risk incident to such defect has no application where neither the master nor servant contemplated any increased hazard from the use of the machine, but the promise was made on account of the defect causing imperfect work.²

3105. The rule was not extended to the case of one using a ladder for lighting lamps in front of a store, where the superintendent had promised the employee that he would have hooks and spikes placed upon the ends. A ladder is not such an appliance as comes within the rule.³

F. Continuing in Service an Unreasonable Time.

3106. If the servant continue his employment for an unreasonable time after the employer could have removed the defects, he will be deemed to have waived his objections and assumed the risk of operating the machinery in the unsafe and dangerous condition in which it is.⁴

¹ Indianapolis Union R. Co. v. Ott, 11 Ind. App. 564, 38 N. E. 842. A. & T. R. Co. v. Kelton, 55 Ark. 483, 18 S. W. 933.

² Tesmer v. Boehm, 58 Ill. App. 609.

³ Marsh v. Chickering, 101 N. Y. 396; Corcoran v. Milwaukee Gas Light Co., 81 Wis. 191; St. Louis,

⁴ Stephenson v. Duncan, 73 Wis. 404; Joliet, A. & N. R. Co. v. Velie (Ill.), 26 N. E. 1086, 140 Ill. 59, 29 N. E. 706; Gulf, C. & S. F. R. Co. v. Brentford, 79 Tex. 619, 15 S. W. 561.

3107. Where a complaint alleged a promise to remove a defect, and further alleged that the defendant had ample time and opportunity, and was abundantly able to repair and put in safe condition the machinery and apparatus between the time the plaintiff informed him of its defects and the time when plaintiff was injured, but neglected and failed to do so, it was held that this allegation implied that the plaintiff continued his employment beyond the period of time within which he might reasonably expect the defendant would keep his promise and put the machinery in proper condition.¹

3108. Where a section-man knew of a defect in the hand-car he was using and had notified the section-boss, who had promised him to repair it, and the employee continued in the service using the car, knowing that repairs had not been made, for six months after such promise, and the trial court in his charge to the jury stated that it would not be negligence for the servant to remain in the employment, provided he notified the master and he promised to remedy the defect, it was held that such charge was objectionable, in that it left out of consideration the question of the length of time the employee continued in the service after the promise as to its being reasonable.²

3109. Where it was alleged that a miner who was injured in a shaft of a mine by an explosion had some ten days prior to his injury been promised that sufficient ladders would be provided to enable him to ascend from the place of injury, which promise had not then been performed, and his injury was attributed to such neglect, it was held that whether he had continued in the employment beyond a reasonable time when he was justified in believing that the ladders would be supplied, and therefore had waived his objections to working under the conditions of such danger, was a question which should have been submitted to the jury.³

¹Stephenson v. Duncan, 73 Wis. 404.

³Davis v. Graham (Colo.), 29 Pac. 1007.

²International & G. N. R. Co. v. Williams, 82 Tex. 342, 18 S. W. 700.

3110. Where a blacksmith gave notice to the foreman in charge of that department of the defendant's work that his helper was incompetent, and threatened to leave the service unless another helper who was competent was furnished, and such foreman promised to give him another helper, no time being designated when he would do so, and such blacksmith was injured on the fourth day after the promise, as was alleged, by the incompetency of such servant, it was held that the question of plaintiff's negligence in thus remaining in the service was a proper one for the jury.¹

3111. The Kansas court held that if the promise is not performed within a reasonable time, that for an injury occurring thereafter the servant may still rely upon it, and will not be deemed to have waived his obligations.²

3112. Usually, where some instrument or appliance has become unsafe for use or otherwise, and the danger from its use is not imminent or obvious, the servant may continue in the master's employment and use it for a short time with the expectation that the master will restore the defective instrument or appliance to its former condition. Also where the master has been informed with regard to some defect in some instrument or appliance, and he agrees to remedy the defect, the servant may continue for a reasonable time in the master's employment so as to give him an opportunity to fulfill his promise. But if a servant continues in his work an unreasonable length of time, or if the danger is imminent or obvious, he assumes the risk incident thereto.³

3112a. The assurance of the master that the danger shall be removed is an agreement by him that he will assume the risk incident to the danger for a reasonable time. The promise will be implied to continue only a reasonable time, and the injury must have occurred within the time at which the defects were promised to be removed. If the employee

¹ *Lyberg v. Northern Pac. R. Co.*,
39 Minn. 15, 38 N. W. 632.

² *Atchison, T. & S. F. R. Co. v.*
Sadler, 38 Kan. 128, 16 Pac. 46.

³ *Morbach v. Home Mining Co.*,
53 Kan. 731, 37 Pac. 122; *Rush v.*
Railway Co., 36 Kan. 129, 12 Pac.
582.

continues longer than this, he does so without reliance upon the promise and is as hazardous and hopeless of remedy as though the promise had not been made. It constitutes a waiver of the defects agreed to be remedied.¹

3113. Where the alleged cause of injury to an employee was the absence of a railing around a platform, which was his place of work, and it was averred that the employer had promised to construct such a railing within a reasonable time, and that the plaintiff had worked but three or four days prior to the accident, it was held upon demurrer that the complaint was defective in not averring that a reasonable time had intervened between the promise and the injury for the defendant to make the repairs, and that for such reasonable time the employee assumed the risk.²

3114. Upon rehearing this decision was reversed, and it was stated that no such length of time had intervened as would evidence the belief that the employer had intended to or had violated his promise, or warrant the inference that the danger was so imminent that one of ordinary prudence would not have continued to use it.³

3115. A limitation generally recognized upon the doctrine that the promise to repair places the risk upon the master is that the servant can rely upon the promise only a reasonable time for the master to comply with it, and he must not himself be guilty of a want of due care contributing to his injury.⁴

3116. Where the evidence tended to show a promise on the part of the master to remedy a defect in an appliance, such promise being made from time to time, and the plaintiff, relying upon such promises of the master to have it repaired, continued in the service operating it for several weeks prior to his injury, it was held that whether the plaintiff remained in such employment only a reasonable time or an

¹ *Eureka Co. v. Bass* (Ala.), 8 So. 216.

² *McDowell v. Chesapeake, O. & S. W. R. Co.* (Ky.), 5 S. W. 413.

³ *McDowell v. Chesapeake, O. & S. W. R. Co.* (Ky.), 8 S. W. 872.

⁴ *Texas & N. O. R. Co. v. Bingle* (Tex.), 29 S. W. 674.

unreasonable time after the promise was mainly a question of fact for the jury.¹

3116a. Where it appeared that a promise had been made to a motorman to repair a defect in a track, and it was urged there was not sufficient time between the time defendant had notice of the defect and the injury to the employee to have repaired the track, it was said that was no excuse for using the defective track. If it could not be immediately repaired so as to make it safe, its use should have been discontinued.²

G. Where Danger is Imminent the Promise May Not Excuse the Servant.

3117. Where the defect is so glaring that with the utmost care and skill the danger is still imminent, so that none but a reckless man would incur it, then, if the servant will engage in the hazardous undertaking, he must be considered as doing so at his peril, notwithstanding he may have assurances from the master that the defect causing the danger will be remedied.³

3118. Where a railroad company agreed to repair an engine upon complaint being made by the engineer of its unsafe condition by reason of certain defects, and the engineer continued in the employment and was injured on that day, it was held that the verdict of the jury in favor of the plaintiff should be sustained. That it was a question of fact for them to determine whether the danger from continuing in the service was so imminent that no one but a person utterly reckless of his personal safety would venture it, and the jury having found that it was not, the plaintiff could recover upon the promise of the master to make the repairs.⁴

¹Ferriss v. Berlin Machine Works, R. Co. v. Watson, 114 Ind. 20; 90 Wis. 541, 63 N. W. 234. Hough v. Railway Co., 100 U. S.

²Harris v. Hewitt (Minn.), 65 N. 213. W. 1085.

⁴Missouri Furnace Co. v. Abend,

³Conroy v. Vulcan Iron Works, 107 Ill. 44. 62 Mo. 35; Indianapolis & St. Louis

3119. Notwithstanding the promise, the question still remains whether the employee was in the exercise of proper care in remaining in the employment as well as in doing the work or in exposing himself to a known danger.¹

3120. Where a servant simply protests, and, without any promise or anything said or done by the master to induce him to remain in the service in the confidence that repair will be made, continues to use the thing, the rule is not changed and the risk is upon the servant. The Texas court does not agree with those authorities which treat the question as one of contributory negligence, notwithstanding the promise, but holds that the question is one where the servant assumes the risk — assumption of the risk and contributory negligence are distinct defenses. The reason why the promise modifies the rule is that the objection and promise leave the risk where the duty is — upon the master. The promise, however, does not relieve the servant of the duty resting upon men generally of using reasonable care for their safety. It was said in reference to *Railway Co. v. Brentford*, 15 S. W. 561, 79 Tex. 619: "It is intimated there that the servant cannot hold the master responsible for an injury resulting from such a risk, if he knew, when he exposed himself, that the promise had not been complied with. But it seems to us that such a view, unless it be limited to cases in which the servant has been guilty of negligence, disregards the effect of the promise of the master, as taking upon himself the risk incurred by the servant in doing the work. The mere fact that the servant acting under such a promise knows at the time he receives his injury from the defective condition that it has not been removed does not impose upon him the risk, any more than did his continuance in the service with knowledge of the defect at the time the promise was made."²

3121. Where injury to an employee was occasioned by the breaking of a harness upon the employer's horse while

¹ *Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561.

² *Texas & N. O. R. Co. v. Bingle* (Tex.), 29 S. W. 674.

driven by the defendant, and it appeared there was such a combination of a vicious horse and old, rotten harness that an accident was reasonably to be expected, it was held that a promise on the part of the employer that he would fix the harness or get a new one was not sufficient to relieve the employee from an assumption of the risk.¹

3121a. A motorman in the employ of the receiver of a street railway company notified the defendant that a rail in the track was broken and held in place by defective spikes, whereupon the defendant promised to have it repaired but neglected so to do, and thereafter such motorman was injured by the derailment of his car caused by such defect. It was held that the promise relieved him from an assumption of the risk; that it did not appear that the use of the defective track was so immediately and imminently dangerous that a man of ordinary prudence would have refused to use it.²

3121b. Where the master promises, upon his attention being called by a miner engaged in running a tunnel to an accumulation of debris, to remove it, the latter may rely upon such promise for a reasonable time for its performance, where it appears that danger from the falling of the roof is not obvious, and such employee is assured by the master that the roof is safe, upon which assurance he relies.³

3122. Where it was alleged that a laborer engaged in shoveling a bank of earth, knowing the danger of the liability of the bank to fall, requested the supervisor in charge to have a man watch it, and he received assurances that such assistance would be given, and the court having charged the jury that if the laborer notified the supervisor of the dangerous condition of the bank he would be relieved from the implication of negligence during the time necessary to obtain a man to watch it, it was held that this was error, as it left out of consideration the question of the plaintiff's

¹ *Levesque v. Janson*, 165 Mass. 16.

³ *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273.

² *Harris v. Hewitt (Minn.)*, 65 N. W. 1085.

contributory negligence. It was said: It was his (the servant's) duty to exercise diligence and care in protecting himself from harm without regard to any assurances he might have received from the supervisor that the assistance he had asked for would be given. The defendant was not liable if the danger which the plaintiff apprehended from the beginning was so imminent or manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose would be removed. If he failed to exercise care, if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises of assurance of the character alleged, be guilty of such contributory negligence as would defeat a recovery.¹

3123. Where an employee was injured by the fall of a ladder, knowing it to be unsafe, and it was alleged that the employer, upon his complaint, promised to furnish a better one, it was held such a promise did not relieve him from an assumption of the risk. It was said that he knew it could not be used with any assurance of safety, and he assumed the risk. The promise of the master would not justify the employee in looking to his master for compensation for damages which he sustained by wantonly and recklessly encountering the danger which he knew necessarily attended the use of the old ladder.²

3124. Where the alleged cause of injury to an engineer was a defect in the pilot upon an engine, and it appeared he knew of its defective condition and had complained to the master-mechanic and received a promise to remedy the defect, it was said that if he had continued to use the engine without giving notice of its defects to the proper officers of the company he would undoubtedly have been guilty of contributory negligence. He would be held in that case to

¹ District of Columbia v. McElligott, 117 U. S. 621. See McKelvy v. Chesapeake & Ohio R. Co., 35 W. Va. 500, 14 S. E. 261.

² St. Louis, A. & T. R. Co. v. Kelton, 55 Ark. 483, 18 S. W. 933.

have himself risked the danger which might result from the use of the engine in its defective condition. But there can be no doubt that where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept. It was held that knowledge on the part of the engineer of the defect was not conclusive, as matter of law, of want of care on his part; but it was still a question under the circumstances, in view of the promise to remedy the defect, whether none but a reckless engineer, utterly careless for his safety, would have used the engine without having it removed.¹

3125. Where an employee while using a machine acquired knowledge of a defect therein, and complained to the foreman, whose duty it was to see that the machine was kept in repair, who promised to repair it as soon as the operator had done a little more work upon it, and very soon thereafter such operator was injured while operating it, due to its defective construction, it was held that the fact of having knowledge of the defect and danger, and notwithstanding continuing in the employment, was not conclusive upon the question of his negligence. That whether, after the promise, he remained in the employment because of his reliance upon the promise, and whether the machine was so out of repair that a man of ordinary prudence would not continue to use it, even after the promise to repair, were questions of fact proper for the jury.²

H. *Promise Must be by One with Authority.*

3126. A servant whose duties require him to work in a place known by him to be unsafe, so that he would otherwise be taken to have assumed the risk, cannot relieve him-

¹ Hough v. Railway Co., 100 U. S. 213.

² Manufacturing Co. v. Morrissey, 40 Ohio St. 148.

self from such assumption of the risk by showing a promise to make the place more safe by one other than his master, unless such other person had authority to determine what should be done for the safety of those employed in the place, and to do it or have it done. This rule was applied where a millwright in a mill promised to fix a dangerous place, but it did not appear the master had delegated to him the authority to decide what alterations or repairs should be made, but his duty was to make repairs when determined upon by some one else.¹

3127. A foreman of yard switchmen, who has no power to hire or discharge any employee, is not *prima facie* the proper person to receive complaints from a switchman of the incompetency of a fireman on a switch-engine, nor does his promise to have another substituted for such incompetent one justify the switchman in remaining in the employment. The burden is upon the plaintiff in seeking to avoid the defense of fellow-servant to prove the fact that the person who induced him to remain under a promise to remove the fireman was a representative of the master.²

3128. Where an employee was injured by falling from a platform without railing, the fact that he notified one whose duties were the employment and discharge of hands in the shop of the defect, and he had promised to have a railing put upon it soon, did not make the master liable, upon the ground that he was not the person representing the master in respect to such matters; that another employee who had charge of the machinery and repairs was the proper person to order repairs made.³

3129. Where the promise is made by one who is a fellow-servant, neither his promise or negligence can fix liability on the master; but if he is charged with the duty of remedying the defect, servants may rely upon his promise as

¹ *Ehmcke v. Porter*, 45 Minn. 338, 47 N. W. 1066. *Eckols*, 7 Tex. App. 429, 26 S. W. 1117.

² *Galveston, H. & S. A. R. Co. v.* ³ *Chesapeake, C. & S. W. R. Co. v. McDowell* (Ky.), 24 S. W. 617.

fully as that of the master. This was said where it was alleged that an overseer of the work of loading iron, upon complaint made by one of the workmen, promised that additional lights would be furnished. Another employee was in general charge of the work, and it did not appear that the company had intrusted the former with the duty of furnishing lights.¹

3130. Where the cause of injury to a miner was alleged to be defective fuse, and the superintendent had promised him some six days prior to the accident that he would get other fuse, and told him to do the best he could with what he had, it was held that the promise of the superintendent was binding upon the company. The rule was stated that, in order to bind the master, such a promise must be made by one having authority in the premises.²

3131. Where the alleged cause of injury to a yard-master was the absence of blocking in a frog, and the section-master to whom the yard-master applied to improve the track at that point notified him he could not do it without orders from his superior, but upon a subsequent application promised conditionally that he would do it if he got time Saturday afternoon, it was held that this was insufficient to bind the company and relieve him from the risk, and that there was no reasonable connection between such indefinite and contingent promise and his continuance in the business.³

3132. A brakeman was injured while standing on the steps at the end of the tank of a switch-engine, in being jerked from the steps by the suddenness with which the fireman who was in charge of the engine reversed it. The rail upon the tender had been broken off. Such brakeman had complained to the yard-master about the defect in the engine and objected to the fireman working the engine. The yard-master or assistant master-mechanic promised to have the engine fixed by the next Saturday night, which prom-

¹ *Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561.

² *Eureka Co. v. Bass*, 8 Ala. 216.

³ *Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326, 33 N. W. 908.

ise induced the plaintiff to remain in the service. He had before quit work on account of the fireman handling the engine, but was induced to return by the promise of the yard-master that the fireman should not handle the engine any more. It was held that the promise of the yard-master was binding on the company; that the question of reasonable time within which the repairs should be made was properly a question for the jury.¹

3133. Where a brakeman was injured by reason of a defective foot-rest and hand-hold for ascending to brakes on cars, and he had complained to the conductor, who had assured him the defect would be remedied, it was held that such a promise on the part of the conductor was binding upon the company; that while he was not authorized to make repairs, he bore the relation of vice-principal to the brakeman on his train.²

3134. Where a suitable engine became out of repair and there was substituted for it a road-engine until repairs could be made, the latter not being provided with a run-board, as was the former, and it appeared a switchman objected to the yard-master, who had no authority to supply the run-boards, but whose duty it was to communicate the objection to the train-master, which he failed to do, but assured such employee that the engine would only be there a few days, and that if the old engine was not repaired soon he would have a new one, it was held the complaint was sufficient to charge the master, and that it was for the jury to say whether the defendant was negligent in not providing an engine with foot-boards, and also whether the servant was induced to remain in the employment upon assurance of the defendant that a proper engine would be furnished.³

3135. Where an employee made complaint to the acting and also regular conductor of the train of defects in a draw-

¹ *Lyttle v. Chicago & W. M. R. Co.*, 84 Mich. 289, 47 N. W. 571.

³ *Pieart v. C., R. I. & P. R. Co.*, 82 Iowa, 148.

² *Railroad Co. v. Kenley*, 92 Tenn. 207.

bar upon one of the cars, and the conductor said he would report it if he could find the car-repairer, and after that such employee had, by reason of being assigned to other duties, no occasion to learn whether the repairs had been made until injured, it was said: Under all the circumstances, the plaintiff, in view of his absence and the lapse of time, might reasonably suppose that the defendant had done its duty and repaired the defect.¹

3136. Where an engineer had notified the company that the snow-plow upon his engine was out of repair, and before using it again he was sick for about two weeks, when suddenly in the night-time he was called upon to take out a passenger train while a severe storm was raging, and while so engaged the engine was thrown from the track by reason of such defective plow, as was alleged, and he was killed, it was said: As he had given notice of the defect to the proper officer whose duty it was to make the repairs, and the impression had been conveyed to him that these would be made, he had a right to assume that they had been made, and to act upon that assumption. The mere fact of his taking the engine out at midnight under the circumstances did not of itself, unsupported by other proof, imply an assumption by him of the risk resulting from the dangerous and defective attachment to the engine.²

3137. Where injury to a brakeman was caused by a defective hand-hold or foot-rest on a car, and it was claimed that such brakeman had complained to the conductor of its condition, and received assurances from the conductor that it would be repaired, it was held that such promise was binding upon the company. It was said that notice to the company was implied by the notice or complaint made to the conductor. The promise of the latter to have the same repaired, or his statement that the car-repairer had promised to repair as soon as he could, and that it would be done very soon, was a sufficient assurance to justify the plaintiff in believing that

¹ *Belair v. C. & N. W. R. Co.*, 43 Iowa, 662.

² *Northern Pacific R. Co. v. Babcock*, 154 U. S. 190.

the defect would be remedied within a reasonable time. That the conductor was not himself authorized to make the repairs or alteration is no valid objection. The conductor was the immediate superior of the plaintiff, and his assurance that the matter would be remedied is in law to be imputed to the master. As the vice-principal in charge of this train, and as to the crew operating the train, notice to him was notice to the master, and an assurance of remedy, made upon complaint of his own subordinates and in regard to an appliance upon his own train, was an act within the sphere of his duty towards his inferior. It was further held that a rule which required conductors, flagmen, brakemen and train-reporters to report to and receive their instructions from the master of trains had no application to defective appliances.¹

3138. Where an engineer in the employ of the defendant in its mine was injured by his clothing becoming caught in the projecting bolts of a coupling on a shaft, and it appeared that a promise had been made to him by the foreman in charge that he would have the coupling covered, it was held, under the particular circumstances of the case, such promise was binding upon the master. That it was fairly within the scope of such foreman's authority, as foreman, to cause the covering to be made. That the question was not whether he was a vice-principal in such sense that the company would be liable for all his negligent acts, but whether his functions were such that he had the right, in the discharge of his duties and in the exercise of his judgment and discretion, to cause the shaft coupling to be covered.²

¹ Louisville & N. R. Co. v. Kenley, 92 Tenn. 207, 21 S. W. 326.

² Homestake Mining Co. v. Fullerton, 69 Fed. 923 (C. C. A.).

CHAPTER XVII.

RELATION.

- A. *General Rule*, 3139 et seq.
- B. *Servants of Different Persons Using the Same Track or Grounds*, 3148 et seq.
- C. *Servants in General Employment of One Working Temporarily for Another*, 3185 et seq.
- D. *Servants in General Employment Injured while Not Actually at Work*, 3208 et seq.
- E. *Servants Injured on Trains or Vessels when Not Employed Thereon*, 3226 et seq.
- F. *Servants of Another Working upon Trains or Vessels Injured Thereon*, 3243 et seq.
- G. *Volunteers*, 3253 et seq.
- H. *Public Officers' and Municipalities' Liability for Acts to Employees*, 3266 et seq.
- I. *Receivers, Liability of*, 3285 et seq.
- J. *Convicts*, 3287.

A. *General Rule.*

3139. When relation exists.—The relation of master and servant only exists where the person sought to be charged as master either employed or controlled the servant, or had the right of control over him at the time when the injury happened, or expressly or tacitly assented to the rendition of the particular service by him. He must at the time have had the right to direct the action of the servant and to accept or reject its rendition by him.¹

3140. The rule of *respondeat superior*, as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and to the

¹ Mound City Paint & Color Co. v. Conlon, 92 Mo. 221.

subjects to which that relation extends, and is co-extensive with it, and ceases where the relation itself ceases to exist. It is founded on the power the superior has a right to exercise, and which for the prevention of injuries to third persons he is bound to exercise over the acts of his subordinates. Therefore the rule cannot be applicable where no such power exists.¹

3141. The right of selection is the basis of responsibility of the master or principal for the acts of his agent. No one can be held responsible as principal who has not the right to choose the agent from whose act the injury flows.²

3142. It was said he is to be deemed master who has the superior choice, control and direction of the servant, and whose will the servant represents not merely in the ultimate results of his work, but in all details.³

3143. A master cannot escape his liability to his servant for negligence by relegating him to a third party, the servant continuing the original employment without knowledge of a change in the relations between him and his employer.⁴

3144. A substitute hired by an employee with the consent of the employer stands in the regular employee's place, with all its responsibilities and liabilities, as far as the master is concerned, and one who would be a fellow-servant of such regular employee is a fellow-servant with the substitute, though no contractual relation exists between the substitute and the master, and though such regular substitute alone is responsible for the substitute's wages.⁵

3145. The relation of master and servant exists where the latter is employed, not by the master directly, but by an employee in charge of a part of the master's business with authority to engage assistance therein; and the fact

¹ Blake v. Ferris, 1 Seld. 48.

⁴ Missouri, K. & T. R. Co. v. Ferch.

² Boswell v. Laird, 8 Cal. 469; (Tex. App.), 36 S. W. 487.

Du Pratt v. Lick, 38 Cal. 691.

⁵ Anderson v. Guineau, 9 Wash.

³ Robinson v. Webb, 11 Bush 304, 37 Pac. 449.

(Ky.), 464.

that the subordinate employee receives compensation proportioned to the work done does not alter the case. Hence, where an employee was an operative in defendant's mill, employed by the roller boss and paid by him, it was held he should be treated as an employee.¹

3146. Where an action was brought against several persons as the "proprietors" and "builders" of a church, by one who was working on the construction of the church, for personal injuries alleged to have been received through negligence in its construction, and the evidence was to the effect that such defendants were not proprietors of the building, and had no interest in it either as owners or contractors, but that some of them were merely commissioners and members of the church and that the others were engaged as laborers in the construction of the church, and that the plaintiff was employed, if at all, by the commissioners and superintendent, not on their own account but for the church as an organization, it was held that such persons were not his employers nor were they liable to him for his injuries.²

3147. If a railroad company employed another corporation to construct for it a railroad under a contract by the terms of which, if strictly carried out, the other corporation would be an independent contractor, and consequently the railroad company would not be liable for injuries occasioned by defects in the construction of the road-bed, but afterwards the parties abandoned this contract, and the railroad company, by its officers and servants, took charge of and supervised the work, gave direction as to how the road-bed should be constructed and assumed general management and control of the enterprise, the railroad company could not relieve itself of liability for injuries occasioned by negligent or improper construction, but would be primarily responsible.³

¹ *Rummell v. Dilworth*, 111 Pa. St. 343.

³ *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82.

² *Wilson v. Clark et al.*, 110 N. C. 364, 14 S. E. 962.

B. Servants of Different Persons Using the Same Track or Grounds.

3148. Where two companies use the same track, and each controls its own trains, the servants of the two companies are not fellow-servants.¹

3149. Where one company uses the tracks of another under a lease which provides that its trains shall be under the control of the yard-master of the lessor company, such yard-master becomes its servant for the time being, and it will be liable for an injury caused another from the negligent acts of such yard-master, the same as if he was its own employee upon its own road. Such lessee also makes that part of the track it uses its own so far that it will be responsible for all injuries resulting from negligence in keeping or permitting it to be in an unsafe condition.²

3150. Where two companies are using the same track under proper rules and regulations as to each, the negligence of the employees of one company, causing injury to an employee of the other, is, so far as the latter company's responsibility is concerned for the act, a risk assumed by its servant.³

3151. The relation of master and servant does not exist between a railroad company and an employee of a third party working upon its track in performing duties relating to the business of such third party; therefore the rule of assumption of risks has no application. The conduct of such employee is the subject of contributory negligence.⁴

3152. Employees in the service of a railroad company who may be injured by defects in the road-bed of another company whose tracks it is using is in no sense a servant of the latter company.⁵

¹ Chicago & Eastern Illinois R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263.

³ C., B. & Q. R. Co. v. Clark, 92 Ill. 43.

⁴ Pennsylvania Co. v. Backes, 133 Ill. 255, 24 N. E. 563.

² Wabash, St. L. & Pac. R. Co. v. Peyton, 106 Ill. 534.

⁵ Snow v. Housatonic R. Co., 8 Allen, 441.

3153. Where two or more persons or corporations are operating a railroad, their liability to an employee for an injury resulting from defective machinery furnished to them for use in the course of the employment is several as well as joint, and an action is maintainable against either one of them.¹

3154. A person employed as a track-repairer by one railroad company is not to be considered the servant of another company using, by permission, the tracks of the former.²

3155. Where a brakeman whose duty it was to uncouple cars upon tracks known to him to be unblocked and dangerous, which tracks the railroad company employing him had a right to use, under contract with the managers of another railroad company who owned them, and while so engaged caught his foot in a frog and was injured, it was held he had assumed the risk.

To the argument that he was not the servant of the company which owned the track and against which he brought his action, it was said: Whatever the obligations of the defendant may have been under the contract with such other company, it was under no greater obligations to its servants to furnish a suitable road for them to work upon than it was to its own servants.³

3156. Where an employee of a furnace company was injured by alleged defects in the brakes upon a railroad car which his duties required him to unload, it was held he had no ground for recovery against his employers, as the cars belonged to the railroad company.⁴

3157. A brakeman upon a locomotive owned and operated by a steel company, which also owned two spur tracks connecting with the lines of a railroad company, and which the railroad company only used for delivering to and receiving from the steel company cars, was injured by the negligence of the railroad company in the use of such track. It

¹ *Kain v. Smith*, 80 N. Y. 458.

³ *Wood v. Locke*, 147 Mass. 604.

² *Catawissa R. Co. v. Armstrong*,
49 Pa. St. 186.

⁴ *Anderson v. Oliver*, 138 Pa. St.
156.

was held that such brakeman was in no sense in the employ of the railroad company, under the statute (Act of April 4, 1868), or otherwise.¹

3158. It was held that a person in the employ of an individual owner of cars run on a railroad under contract with the company was, when in charge of such cars, an employee of the company under the Pennsylvania statute.²

3159. It was said, so far as the liability of a railroad company is concerned to one of its employees by reason of a defective track, it is of no concern that the track was owned by another company, so long as it appears that the employee's injuries were sustained while the company by which he was employed was using it.³

3160. Where two railroad companies have a traffic interchange of cars, if one sets loaded cars on the track of the other at an unusual time of the night, and does not give notice or put out danger signals, whereby an employee of the other is killed by collision with the obstruction, it is liable in damages for the negligence.

It seems that both companies may be liable in such case; the company by which deceased was employed because it must furnish a clear track, or because the other company is *pro hac* its agent or servant in this matter.⁴

3161. Where a coal train of a railroad company, whose tracks were located near the docks of the coal company, was delivering coal to the latter company, and a brakeman of such coal company, while engaged in coupling cars of the trains of such railroad company, was injured by the negligence of such railroad's engineer, it was held he was not a fellow-servant of the engineer.⁵

3162. Where a railroad company whose road formed a junction with another road intrusted a person employed

¹ *Spisak v. Balt. & O. R. Co.*, 152 Pa. St. 281.

² *Miller v. Cornwall R. Co.*, 154 Pa. St. 473.

³ *Smith v. Minneapolis L. R. Co.*, 18 Fed. 304.

⁴ *Lockhart v. Little Rock & M. R. Co.*, 40 Fed. 631.

⁵ *Central Railroad Co. of New Jersey v. Stoermer*, 51 Fed. 518

(C. C. A.).

and paid by such other company with the business of attending to its trains at such junction, it was held that the fact that such person was employed by such other company did not change his relation as a servant of the former or release it from damages caused by his negligence.¹

3163. It was held that a railroad company did not bear the relation of master to a person or his employees who were engaged in removing, by the company's permission, upon its tracks, by means of grade and brakes alone, cars which had been hired to such person, for injuries sustained in such service by reason of the negligence of their employer or of their fellow-servants.²

3164. It was said that if a railroad sees fit to permit another person or corporation to run steam cars over its road, it is liable to third persons for damages caused by the negligence of such person or corporation, the same as though the company had itself been moving the cars. Hence it was held that such a company owning the road was liable to a fireman of a construction company using its track, who was injured by reason of a collision with another train operated also by such construction company.³

3165. Where a brakeman of a railroad company was sent to accompany a train to deliver a load of lumber at a mill located on the line of another railroad, and while on this mission, upon the train which was in charge of the employees of the latter company, the car upon which he was riding was derailed, owing to the bad condition of the track, and he was killed, in an action brought by his widow against the latter company it was held that she could maintain the action if the deceased was free from negligence. It was not determined whether he was an employee of the latter company which was in charge of the train. It was merely said it was not clear that he was.⁴

¹ Taylor v. Western Pac. R. Co., 45 Cal. 324.

² Hanna v. Railway Co., 88 Tenn. 310.

³ Macon & Augusta R. Co. v. Mayes, 49 Ga. 355.

⁴ Killian v. Augusta & K. R. Co., 78 Ga. 749, 3 S. E. 621.

3166. Evidently it was the same case that was before the supreme court a few months later. No reference is made to the foregoing decision. The facts stated differ in this: that in the latter appeal or case it is stated that the train was in charge of the employees of the company of which the deceased was an employee, and was operating the train upon the track of the other company by permission.

It was held that he was not an employee of the company owning the track, and the following conclusions were reached and stated:

1st. That he was an employee of the road whose trains were being operated upon the tracks of the other, and that the only obligation that the latter road was under to him was to furnish him a safe track on which his train might be safely run, and if it was in fault in this respect, and he was injured solely by the defect in its track, the plaintiff would be entitled to recover.

2d. If the injury to the deceased was occasioned solely by the defect in the trucks of the car which was owned by the company of which he was an employee, he could not recover.

3d. If the injury was caused both by the defect in the track and the defect in the trucks, then the plaintiff would be entitled to recover in proportion as the defect in the track, compared with the defect in the trucks, contributed to the injury.

The company owning the track was liable to the deceased as a passenger, and if the injury was caused solely by a defect in the track, and he was not negligent nor could have avoided the injury by the exercise of ordinary care and diligence, the plaintiff would be entitled to recover the amount of damages he sustained. If he was negligent, but could not have avoided the injury caused by the defendant's negligence by the exercise of ordinary care, then the damages should be diminished as in cases of contributory negligence.

The doctrine of comparative negligence prevails in Georgia in cases other than those of employees.¹

¹ Killian v. Augusta & K. R. Co., 79 Ga. 234, 4 S. E. 165.

3167. Two or more chartered railroad companies whose lines terminate at the same point, that is, at the same town or city, are not bound as a matter of law to have and to use separate terminal facilities, but may within the corporate limits use the same track in common, with or without common ownership; and when they do so, a track thus laid, though the exclusive property of one of such companies, is for the time being the track of each company so using it, and the proprietary company is not responsible to its employees for personal injuries which they sustain solely by reason of the negligent use of the track by the employees of another company. The redress for such injuries is against the company whose employees are at fault. The case of *Railroad Co. v. Mayes*, 49 Ga. 355, is distinguished on the ground that there the negligent company was using the franchise as well as the track of the proprietary company, and *Coggins v. Railroad Co.*, 62 Ga. 685, on the ground that the negligence was that of an employee of the proprietary company and the injury was to an employee of a telegraph company.¹

3168. A railroad company sending its locomotive engineer (employed by the month) with one of its engines to haul temporarily for another company the trains of the latter over the line of such latter company is not responsible to such engineer for the bad condition of the track, nor for the want of adaptation of the engine to the track, it not being alleged that the employer company knew of such bad condition or want of adaptation and concealed its information. It is the duty of an engineer running trains upon a chartered railroad to know who is in possession of the line and its franchises, or to use due diligence to ascertain — a public law of the state putting him upon notice of the ownership.²

3169. An employee, who was injured on the line of the Northeastern Railroad in Georgia, claimed that he was an employee of that company, while it was claimed by the

¹ Georgia R. & B. Co. v. Friddell, 79 Ga. 489, 7 S. E. 214.

² Dunlap v. Richmond & D. R. Co., 81 Ga. 136, 7 S. E. 283.

company he was in the employ of the Richmond & Danville Company, and was hired by the latter to work upon the line of the former which it was operating. The evidence in brief was the testimony of the plaintiff that he kept the books at one of the defendant's stations for fourteen days, from which it appeared the accounts were kept in the name of the Richmond & Danville Company; that he made his remittances to such company, and may possibly have been paid by it, but that he did not know that it was operating the road; that he afterwards became a brakeman on the train of a conductor who had been for a long time in the defendant's employ; that the cars were marked with the name of such company, and that the superintendent to whom he applied for his position was the superintendent of both companies. The time schedules published in the newspapers were headed by the name of the defendant, and were separate from those of the operating company. The proprietor of the newspaper received separate passes for their publication. It was held that the testimony as to which company was the employer was sufficient to go to the jury, and that it was error to grant a nonsuit.¹

3170. A railway company permitting by contract or otherwise another railway company to use a section of its main line, not at a terminal point, but to reach such point, is liable to one of its own employees for a personal injury resulting to him from the negligence of the latter company in running its trains over and upon the section used in common by both companies, it not appearing that the negligent company had any legislative authority to adopt and use any part of the main line of the other company. In such case both companies should be considered as using the franchise of the one owning the line.²

3171. The relation of master and servant in no sense exists between the servants of one company or proprietor and the servants of another company or proprietor, where both

¹ *Barnett v. Northeastern R. Co.*,
87 Ga. 199, 13 S. E. 646.

² *Central R. & B. Co. v. Passmore*, 90 Ga. 203, 15 S. E. 760.

are engaged in the use of the same track, grounds or appliances. Therefore, where a servant of one such company is injured by the actionable negligence of the agent or servant of the other, no question arises involving the relation of fellow-servants; and it makes no difference in the application of the rule that the negligent act or conduct related to the character or safety of the appliances which each company was jointly or in common using, nor is it material that the servant's employer owed him a positive duty in relation to the furnishing for his use a reasonably safe place and reasonably safe appliances.¹

3172. A railroad company, under an agreement with another, operated its trains upon a section of the latter's track, from which diverged a side-track, which side-track was under the exclusive control of the latter. An engineer on one of the trains of the former received injuries occasioned by the negligence of the servants of the owners of the track in leaving the switch at the intersection of the main and side-tracks open. His action was brought against the latter company. It was contended on the part of such company that their duty in respect to the premises was governed by contract with the other company, to which alone it was responsible; and also that the injured servant must seek redress from the master in whose employ he was, when the question of liability would be determined by the law regulating the liability of a master to his servant. That in any event, unless the servant had a right of action against his master, he could not recover in the action brought against the defendant. It was said the gist of the action did not arise upon contract between the parties, but from the mere observance of a duty imposed by law. The fact of the existence of a contract was only material as showing that the plaintiff was lawfully upon the road at the time, and was not a trespasser. The rule was applied that it was the duty of the company

¹ Gross v. Railway Co., 62 Hun, way Co., 27 Vt. 369; Omaha & R. 619; Noonan v. N. Y. C. & H. R. R. V. R. Co. v. Morgan, 40 Neb. 604, 59 Co., 131 N. Y. 594; Sawyer v. Rail- N. W. 81.

to keep its road in a safe and proper condition for use, and to exercise that care in the management of the switch as reasonably would prevent injury from that source. The obligation to perform that duty was as co-extensive as the lawful use of the road, and was required as a matter of public safety. This duty is created by law, and exists irrespective of any contract. As to those duties which involve the safety and security of those who are in the lawful use of the road, they are of a general and public character, and for their non-performance any person particularly injured can sustain his action. The principles of fellow-servant and common employment were not in the case, nor could it be said that the train of which the plaintiff was engineer became *pro hac vice* the train of the defendants.¹

3173. Where an employee of a railroad company is injured while on the premises of another railroad company through the negligence of the employees of the latter company, it is enough for the plaintiff to show that he was lawfully there. He is not bound by the terms of the agreement between the two companies. This was held where an engineer of the lessee company was injured while the servants of the other company were attempting to place his engine, which had become derailed, upon the track, by the alleged negligence of such servants in the manner of doing the work.²

3174. A railroad company used a portion of the tracks of another railroad company under an agreement. The operation of such trains while on the said tracks was under the control of the train-dispatcher of the latter company and governed by its rules and regulations. A brakeman on one of the trains of the former company was killed by such train running into the rear end of a train of the latter company during a dense fog, caused by the alleged negligence of the servants and agents of the latter company. It was held that the employees of the two companies were not fellow-

¹ Sawyer v. Rutland & Burlington R. Co., 27 Vt. 370.

R. Co., 160 Mass. 191; Zeigler v. Railway Co., 52 Conn. 543; P. v. W.

² Robertson v. Boston & Albany

& B. R. Co. v. State, 58 Md. 372.

servants, as neither corporation had control over the men in the employ of the other, except that upon a few miles of railroad the trainmen of the lessee company were required to obey the rules and regulations prescribed by the general manager of the defendant for both companies. The several employees of each company were paid by their respective companies. The agreement between the two companies imposed obligations and duties from each to the other, and consequently to the respective trainmen of each.¹

3175. Where two railroad companies jointly occupy the same grounds, such as depot grounds, switch yards and tracks, each company is bound to exercise ordinary care to prevent injuring the employees of the other, and if the employee of one company, while in the discharge of his duties upon such grounds and without negligence on his part, is injured by the negligence of the employees of the other company, such company is liable therefor. This was held where a boy engaged as a car-cleaner of one company, while passing under some cars standing on the track, was injured by an engine of the other company backing against such cars without giving any signals.²

3176. There was evidence tending to show that it was customary for the railroad company of which the deceased was an employee to deliver cars upon the tracks of the defendant company in the usual course of business between the two railroad companies, and that on the occasion of the accident causing injury to such employee a car had been so delivered, but had not been pushed quite far enough upon the track. It was said: It was proper for such first-named railroad company to deliver the car in a suitable place upon the track, even if it was not its duty to do so, and in doing so that company and its servants could not be considered as bare licensees. They were engaged in making a proper delivery of the car in the regular course of the business of the

¹ Phillips v. C., M. & St. P. R. Co.,
64 Wis. 475.

² Omaha & R. V. R. Co. v. Mor-
gan, 40 Neb. 604, 59 N. W. 81.

two railroad companies, and the rules of law applicable to mere licensees do not apply to the plaintiff's testator.¹

3177. Where two companies use the same track though owned by one, such track for the time being is to be considered the track of each company using it, and the proprietary company is not responsible to its employees for personal injuries which they sustain by reason of the negligent use of the track by the employees of the other company. The redress for such injuries is against the company whose employees are at fault.²

3178. A switchman hired and paid by one company to handle and couple all the trains and cars in a union yard jointly used by his employer and two other railroad companies can recover from his employers for injuries sustained while coupling the cars of one of the other companies; and it does not affect his right to recover whether the injuries were occasioned by the defective condition of the cars of the other company alone, or whether they resulted from the defective condition of the cars and the track.³

3179. The plaintiff was a locomotive engineer in the employ of another railroad company which used defendant's tracks. He was operating one of his employer's trains on defendant's tracks, under the orders of defendant's train-dispatcher to meet one of defendant's trains at a certain point. The engineer of defendant's train violated his orders and ran by the meeting point. A collision was the result, in which the plaintiff was injured. It was held that the plaintiff and the engineer of the defendant's train were not fellow-servants.⁴

3180. Act approved March 23, 1888, for the protection of railroad employees, requires every railroad in the state "to adjust, fill or block the frogs, switches and guard-rails on its tracks" so as to prevent the feet of the employees from

¹ *Turner v. Boston & Maine R. Co.*, 158 Mass. 261.

² *Georgia R. & B. Co. v. Friddell*, 79 Ga. 489, 7 S. E. 215.

³ *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444.

⁴ *Texas & Pac. R. Co. v. Easton*, 2 Tex. App. 378, 21 S. W. 575.

being caught therein. It was held, where two railroads receive cars from each other over a delivery track at a certain point, that a person employed by one of them to take the numbers of the cars and inspect their seals as trains were made up at such place by the other was an employee of the latter within the meaning of this statute.¹

3181. Where it was the duty of a vessel to discharge coal upon a wharf, and that of a railroad company to load it on cars at the wharf, both being done in one operation, the appliances used belonging to the railroad company, and its servants had control of the wharf, employed the engineers and the fireman of the gang, and had employed and discharged others of the gang, the vessel paying its dues to such corporation's cashier, who retained a part for the use of the appliances and gave the rest to the foreman for division among the gang, and while a cargo was thus being discharged from the vessel and loaded on the cars a rope broke injuring one of the gang, it was held that a jury was warranted in finding that the person injured was in the employ of the railroad company.²

3182. An employee of a packing company was, while driving a team of horses, injured by contact with an overhead structure across a roadway, which roadway was used and permitted to be used for the accommodation of the occupants of a block of buildings. In an action against the persons who maintained such structure, who were not his employers, it was alleged among other things that the defendants were negligent in failing to provide a light or other signal at such platform to warn persons of its existence, and that the plaintiff had no knowledge of its existence. The injury was occasioned after dark. Upon demurrer it was held the complaint failed to state a cause of action; that it was not enough to show that the defendant had been guilty of negligence without showing in what respect he was negligent, and how he became bound to use care to pre-

¹ *Atkyn v. Wabash R. Co.*, 41 Fed. 193.

² *Daley v. Boston & Albany R. Co.*, 147 Mass. 101.

vent injury to others. It was said: Were the defendants under any higher obligations or duty to the deceased than they had been for a long time to his employers? The deceased having entered the employment of his master for the very purpose of hauling pork in barrels from the rear of their store along the roadway in question to the public streets, must not the injury be regarded as one of the hazards of the employment, so far as these defendants are concerned? True, it is alleged that he did not know of the projecting platform, but was it the duty of any one to inform him? If so, was it the duty of the defendants or his employers? Presumptively his employers must long have known of the projecting platform. Were the defendants under any duty or obligation to inform them of a fact of the existence of which they long have known? Can it be that the defendants were under any higher duty or obligation to the deceased with respect to the dangers of his employment than they were to the persons who employed him?

The authorities cited, both English and American, to sustain the reasoning of the court are numerous.¹

3183. The distinction is made in many cases between those who go upon premises merely for their own convenience and those who come there by invitation, expressed or implied. As to the latter the proprietor owes them the duty of being careful and diligent in keeping his premises safe, while as to the former he owes them no such duty. To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged or which he permits to be carried on there.²

3184. Where a yard-master was injured while coupling cars, which resulted from the defective condition of a set of platform scales over which its trains were accustomed to

¹ *Cahill v. Layton et al.*, 57 Wis. 368; *Metcalfe v. Steamship Co.*, 600. . . 147 Mass. 66; *Gordon v. Cummings*,

² *Plummer v. Dill*, 156 Mass. 426; 152 Mass. 513; *Severy v. Nickerson*, *Sweeney v. Railway Co.*, 10 Allen, 120 Mass. 306.

pass, though owned by and built upon the land of a coal company, it was held the company's liability was the same as though the scales and track were a part of the appliances owned by the company. All masters are bound to furnish their servants with suitable and reasonably safe tools and appliances for the work they are required to do, and the sources of their title to the tools and its extent, whether owned by them, leased or borrowed, or otherwise placed in their possession for use, are wholly immaterial; as between them they are the tools of the master and he is liable to the servants for their defects.¹

C. Servants in General Employment of One Working Temporarily for Another.

3185. Where a servant in the general employment of one is employed with his consent to do work for another he thereby becomes a servant of the latter. The fact that there is an intermediate party, in whose general employment the person whose acts are in question is engaged, does not prevent the principal from being held liable for the negligence of the sub-agent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the under-servant is engaged be such as to give him exclusive control of the means and manner of its accomplishment, and the exclusive direction of the persons employed therefor.²

3186. Where one in the employment of another, receiving compensation from him, is by such other engaged to a third to assist its servants in doing a particular work, and while so at work is injured by the negligence of the latter's servants, he is, notwithstanding his general employment, their

¹ Little Rock & Ft. S. R. Co. v. Co., 154 Mass. 419; Wood v. Cobb, Cagle, 53 Ark. 347, 14 S. W. 89. 13 Allen, 58; Kimball v. Cushman, See Stetler v. Railway Co., 49 Wis. 103 Mass. 194; Johnson v. Boston, 609; Smith v. Railway Co., 18 Fed. 118 Mass. 114; Harkins v. Standard Sugar Refinery, 123 Mass. 400; 304.

² Ward v. New England Fibre Hasty v. Sears, 157 Mass. 123.

fellow-servant. The existence of this relation between him and his immediate employer does not exclude a like relation with the third party to the extent of the special service in which he was actually engaged. So held where an employee was sent by his employer to do specified work in a trench which was being constructed by the defendant city through its servants under direction of its superintendent of streets.¹

3187. Where one person is sought to be charged with the negligence of another, the doctrine of *respondeat superior* applies only where the relation of master and servant is shown to exist between the wrong-doer and the person so sought to be charged at the time of and in respect to the very transaction out of which the injury arose. The fact that the former was at the time in the general employment and pay of the latter does not necessarily make the latter chargeable; hence, where a manufacturer of fireworks sold a committee of citizens a quantity of fireworks, sent a man at the request of such committee to take charge of the display, and also sent a boy to assist him, their expenses being paid by the committee, who took entire charge, the man and the boy acting under their directions, and a bystander was injured by a rocket fired by the boy, it was held that such man and boy were at such time and in the matter of such display the servants of such committee.²

3188. Where one employed of master mechanics men in their general employment, the master mechanics to furnish the necessary tools and tackle to be used by their men, all the men so furnished by each to be under the control of the principal's agent, it was held that such principal was not liable to one of such men for injuries received, caused by the negligent act of a servant furnished by a different master workman, either in furnishing imperfect tackle or in the manner of using it.³

¹Johnson v. Boston, 118 Mass. 114.

³Harkins v. Standard Sugar Refinery, 122 Mass. 400.

²Wyllie et al. v. Palmer et al., 137 N. Y. 248.

3189. Where the owner of a horse and dray, who was engaged under contract with another to do certain work, furnishing his own driver, and upon his driver being taken sick the defendant volunteered to make use of a servant in their employ as driver, it was held that he still remained the servant of the general employer and not the servant of the owner of the team, where such team was killed by such person's neglect.¹

3190. Where an employee of a railroad company was taken temporarily from his work for the company by his superior and was directed to perform an additional service for the latter, it was held that the company was not liable for an accident occurring while he was in the performance of such service. The facts were that the section-men, of which plaintiff was one, had completed their day's work and were proceeding on a hand-car to a station after provisions for the section boss.²

3191. Where one employed as a laborer by a city in digging a trench was injured by the negligence of the driver of a team owned by an individual who had hired the team and driver to the city at a certain sum per day, and the work was in charge of an employee of the city who had the right to direct where the team should be used, it was held that such driver was at such time and in relation to such act the servant of the owner of the team. The question turned upon the point that he was controlled by his employer, though the superintendent of the city directed his place of work.³

3192. It was held that a railroad company was not responsible for negligence in the operation of an engine, when, at the time of an accident, the engine and crew by which it was operated were rented to and under the control of another company.⁴

3193. It was held, where the master employed an independent contractor to perform a specified piece of work,

¹ Hofer v. Hodge, 52 Mich. 372.

³ Reagan v. Casey, 160 Mass. 374.

² Hurst v. C., R. I. & P. R. Co., 49 Iowa, 76.

⁴ Byrne v. Kansas City, Ft. S. & M. R. Co., 61 Fed. 605 (C. C. A.).

and furnished his own general servant, a competent person, to aid the contractor, and placed under his exclusive direction and control in the performance of such work, that the contractor and not the general master was responsible for the acts and negligence of the servant while thus engaged.¹

3194. It was held that an engineer in the employ of a railroad company, subject to be discharged by and receiving his pay from it, was its servant and the company liable for injuries he received while operating a train on such road, though in operating such train he was temporarily subject to the orders of a telegraph company, represented in the immediate control of the train by one of its employees, and the train was being used solely in transporting materials for such telegraph company, and the force engaged in such work were employees of such latter company.²

3195. Where a railroad company furnishes to a contractor engaged in constructing an extension to the company's railroad, an engine and train upon which a fireman, already in the company's service, is by it ordered to work, the company is liable for personal injuries to him caused while obeying this order, by defects in the engine attributable to the company's negligence, although the track of the extension in progress is in possession of the contractor, and the operation and movement of the train are under the latter's control. Under such circumstances the presumption of law arises, where such injuries are without fault on the part of such employee and were received while running the engine, that the injury was occasioned by the negligence of the railroad company. The general rule upon the subject is not changed because at the time of the injury neither the engineer nor the fireman was engaged in the usual and ordinary business of the company as common carriers of freight and passengers.³

¹ Powell v. Construction Co., 88 Tenn. 692.

³ Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82.

² Coggin v. Central R. Co., 62 Ga. 685.

3196. On the issue whether the plaintiff was the defendant corporation's servant, and a fellow-servant of its employees by whose negligence he was injured, there was evidence that he was working by the month for a firm engaged in putting a machine into defendant's mill; that the defendant's agents had prepared the specifications for the machine and sent the order to the firm to do the job, but gave no further directions to the firm in regard to the work; and that when nearly completed in the firm's shop, the machine was carried to the mill to be set up, the supporting wood-work being prepared by the defendant's employees on the same day. A member of the firm testified "there was no contract as to making 'the machine;' we were to charge them for the stock and time." It was held there was evidence upon which the jury might properly find that the plaintiff was a servant of the defendant.¹

3197. Where the owner of a saw-mill gave an order to a firm of master mechanics to make some alterations in the gearing of a water-wheel of his mill, and such firm sent the plaintiff and another workman to do the work, it being understood between these workmen and such owner that the mill would run only at such times as they were not actually at work upon the wheel, and while they were so at work the engineer negligently started the wheel, causing injury to one of them, it was held he could not recover; that he was a servant of the defendant engaged in a common employment with the engineer.²

3198. Where a servant in the employ of and in the pay of one company was doing work for another company in the latter's yards, and was injured by defects in the premises, it was held that the relation of master and servant existed between such latter company and the servant injured. The court referred to *Snow v. Housatonic R. Co.*, 8 Allen, 441, as sustaining their position. In fact, however, such case is in conflict therewith as to the application of the doctrine

¹ *Ward v. New England Fibre Co.*, 154 Mass. 419.

² *Ewan v. Lippincott*, 47 N. J. L. 192.

of *respondere superior*. It was expressly held that the relation of master and servant did not exist, and the right to recover was based upon the absence of such relation. The employee injured was in the employ of one company using the tracks of another, the defendant company, at the time he received his injury.¹

3199. Where a city hired a train and train crew for the purpose of grading its own grounds, and such train was operated upon a temporary track laid thereon for such purpose, such crew being under the direction of the city, it was held that they were, while engaged in such employment, servants of the city.²

3200. The plaintiff was a carpenter employed by the hour by a firm. He was told by such firm there was some work to be done at the defendant's building, and that the superintendent of the building would tell him what was to be done. He went to the building and received his instructions from the superintendent to fix the framework of an elevator door and loosen the door at the top. To do this work it was necessary to stand on a ladder or steps in the elevator hole to take off the door. The boy who was operating the elevator was instructed by the superintendent not to move the elevator below the second floor until plaintiff had finished the work and left the well. The boy disobeyed such instruction and lowered the elevator, causing injury to the plaintiff while at work. It was held that the plaintiff was an employee of the defendant; that he and the boy were fellow-servants, and therefore he could not recover.

The principle stated by Cockburn, C. J., in *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205-209, was stated and applied, namely, that "Where one person hires his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of that man to whom he is hired, although he

¹ *Missouri Pac. R. Co. v. Jones*, 75 Tex. 151, 12 So. 972; *Gulf, C. & S.* 166 Mass. 268, 44 N. E. 218.
F. R. Co. v. Dorsey, 66 Tex. 148.

² *Coughlan v. City of Cambridge*,

remains the general servant of the man who lent him." The plaintiff was not acting under the immediate orders of his general master, the firm who sent him to work for the defendant, but was acting under the orders of the defendant's superintendent, and thus became the defendant's servant, notwithstanding he remained the general servant of such firm and was paid by them.¹

3201. A contractor agreed to lay defendant's track at the rate of a certain number of miles per day, the defendant to furnish all motive power and cars and operate the construction trains. One of such contractor's employees was killed, as alleged, by the too rapid running of a construction train. It was held that the defendant was not liable, for the reason that from the nature and terms of the contract it did not have control of the construction trains, though the trainmen were retained on its pay roll and received their wages from it.²

3202. Where an employee of one railroad company, in the performance of and as a part of his duties, was required to attend to the switches and to couple and uncouple its cars and those of another company at the station where they used a common track, and was injured while performing such duties by reason of the negligence of the latter company, and it appeared he received his pay from the company in whose general employ he was, though the other company paid such company a portion of his wages, it was held that these facts were sufficient to create the relation of master and servant; and the fact that the plaintiff was in the general employment of another company does not change the rule, since a person may be the general servant of one and the special servant of another; that is, he may perform special services for one while he is the general servant of another, and while performing such special service he will be the servant of the one for whom such services are performed as to that particular service. If he is the joint serv-

¹ *Hasty v. Sears*, 157 Mass. 123. Iowa, 655; *Hitte v. Republican Val.*

² *Miller v. M. & N. W. R. Co.*, 76 R. Co., 19 Neb. 620.

ant of the two companies, he has his election to sue one or both of them.¹

3203. The plaintiff was run over by a horse and truck driven by one Murphy, by the negligence of the driver, who at the time was performing service for the Western Electric Company, but was in the employ of the defendant, pursuant to a contract by which the defendant was to furnish the Western Electric Company with a horse, truck and driver daily to do its trucking work for a special period for a special price. The defendant each day selected from its men and equipment the horse, truck and driver which were to be at the disposition of the Western Electric Company, and had selected on the day in question the driver, horse and truck which caused the injury. Such servant had taken a load of goods for the Western Electric Company, and was returning to the factory when he ran over the plaintiff. It was held that the defendant was not the agent or servant of the Western Electric Company, but an independent contractor; hence those employed by the defendant to do the work contracted for were its servants and not those of the Electric Company. It was said: The rule of *respondeat superior* rests in the power which the superior has a right to exercise, and which for the protection of third persons he is bound to exercise over his subordinates. It does not apply to cases where the power of control does not exist, and the power does not exist where the primary employer has no voice in the selection or retention of the subordinates.²

3204. It was held that a person employed by an express company as a messenger upon the trains of a railroad company, and who by the terms of the agreement between such express company and railroad company was to perform the duties of baggageman for the railroad company upon such trains, was not a servant of the latter; and the fact that the rule of the railroad company which provided in substance

¹ Vary v. Burlington, C. R. & M. R. Co., 42 Iowa, 246.

² Quinn v. Complete Electric Const. Co., 46 Fed. 506.

that such persons so engaged should consider themselves employees of the railroad company in all matters connected with the movement and government of trains, and must conform to the directions of conductors thereof, was in force, would not have the effect to place such persons in such relation. The reasoning of the court was that the agreement between the two companies was that the express company for a consideration handled the baggage of the railroad company, and that the injured servant was but the agent of the express company for that purpose.¹

3205. Where a master had sent his servant to assist contractors who had contracted to furnish the machinery and do the work of raising a smoke-stack for the defendant, and he was injured by reason, as was alleged, of the defective condition of the machinery, and failure to warn the plaintiff of the attending danger, and the defendant himself was present, giving directions, it was held that the plaintiff, notwithstanding he was assisting the contractors, was the servant of his employer, and the defendant, his employer, was liable for his injuries occasioned by the insufficiency of the machinery.²

3206. The defendants were repairing a building and employed a skilful carpenter to superintend the whole job. When the time came for putting on the gutters, one of the defendants told the carpenter that he wanted a staging put up, and a staging for the sole purpose of putting on the gutters was erected, under the direction of the carpenter, who used his own brackets to support it. The brackets were insecurely fastened to the building. On the next day the defendants ordered the gutters of a coppersmith and directed him to send a man to put them up. The plaintiff was thus sent, and when he arrived was directed by such defendant where to go to work upon the staging, which fell, causing him injury. It was held that the plaintiff and the car-

¹Union Pacific R. Co. v. Kelley,
4 Colo. App. 325, 35 Pac. 923.

²Blink v. Hubinger et al., 90
Iowa, 642, 57 N. W. 593.

penter were fellow-servants, and the negligence was that of the carpenter.¹

3207. If one engages the servant of another in an obviously dangerous business without such other's consent, he renders himself responsible for an injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury results immediately from the neglect or unskilfulness of the servant, owing to the fact that the person by so illegally interfering assumes all the risks incident to the service. This rule was applied where a minor was injured while acting as brakeman at the mere request of the conductor, without wages and without the consent of his parents. (It is difficult to see how the rule could be extended beyond the facts of the particular case.)²

3207a. Where one engaged to do certain labor on ship-board sends his servant to do the required work in his place, he is to be regarded as a fellow-servant of the ship's carpenter.³

3207b. While recognizing the general rule that the servant of one person may for a particular work or occasion become *pro hac vice* the servant of another, so that the latter will not be liable to him for an injury occasioned by the negligence of other servants engaged with him in the common employment on the ground that they are fellow-servants, the rule is qualified by the statement that, in order to establish such relation of master and servant between the servant thus temporarily serving another and such other, it must appear that the servant has consented, either expressly or impliedly, to the transfer of his services to the new master, and has submitted himself to the direction and control of such master. Hence, where a rolling-mill company contracted with a railroad company to furnish at a

¹ Killea v. Faxon et al., 125 Mass. 485.

³ Saunders v. The Coleridge, 72 Fed. 676.

² Louisville, etc. R. Co. v. Willis, 83 Ky. 57.

specified price the materials for rebuilding bridges, and also skilled workmen to erect such bridges, and such workmen were supplied and were paid by their direct employers, who in turn were repaid with an additional per cent. by the railroad company, and the work was done under the direction of the engineer of the railroad company, but the foremen of the men were furnished by the rolling-mill company, and where one of such men so furnished was injured by an employee of the railroad company in running an engine over his hand, it was held that the question whether he was a servant of the railroad company, and therefore a fellow-servant of the train employees of such company who caused the injury, was properly a question for the jury.¹

3207c. Where a room containing machinery is rented by a lessee, the machinery being operated by employees hired and paid by the lessor, while such machinery is being operated solely with the lessee's work, and the men operating are subject to his control and direction, they are the fellow-servants of a person employed by the lessee to work under the direction of one of those who are operating such machinery.²

D. Servant in General Employment Injured while Not Actually at Work.

3208. Where a servant is working over-time in the line of his employment, he is subject to the usual risks thereof.³

3209. An employee, a wiper of engines in defendant's round-house, in going to and from his work was, with other employees, in the habit of using a beaten pathway across the defendant's yards. While going to work along this pathway, and just as he was crossing the track, he was injured by the coming together of two freight-cars which had been left apart to allow the employees to pass. It was held

¹ Delaware, L. & W. R. Co. v. Hardy (N. J. L.), 34 Atl. 986. ³ Kehoe v. Allen et al., 92 Mich. 464, 52 N. W. 740.

² Rozelle v. Rose (N. Y.), 3 App. Div. 132.

that at such time and under such circumstances he was in the employ of the defendant, and a co-employee of the trainmen.¹

3210. It was said: It does not follow that, because an employee has been given an intermission from work for an hour and a half at dinner, he ceases during that time to be a servant of the employer. If during that time he had in his care or control any of his master's property, requiring his attention and oversight, or if called upon to perform work by the master, or by any one having authority to command his service, the relation would still exist, arising in the one case from duty to properly care for the property of the master, and in the other from duty to perform the service.²

3211. Where a servant regularly employed as a superintendent, having multifarious duties which he might have to perform at any time while on his master's premises, was injured while going from said premises to attend to business of his own, which he was permitted to do by his employer, it was held he was at such time to be considered a servant of the defendant. The statement was advanced by the court that at any time during working hours when he was on the defendant's premises, his duty was to look after and perform his duties there.³

3212. Where employees without the actual consent of the officers of the road, but with their knowledge, have been accustomed to use a switch-engine to be carried from the round-house to their meals, it was held a proper question for the jury whether on such occasion the engine was engaged in the business of the company. This was said where an infant not an employee was injured by the negligent manner in which the engine was operated.⁴

3213. Where an employee was killed by the explosion of a boiler in use by his employer, and it appeared that this

¹ *Ewald v. C. & N. W. R. Co.*, 70 Wis. 420.

³ *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270.

² *Broderick v. Detroit U. R., S. & D. Co.*, 56 Mich. 261, 22 N. W. 802.

⁴ *Reilly v. H. & St. J. R. Co.*, 94 Mo. 600.

occurred a short time prior to the hour at which his day's work commenced, but that he had certain preliminary duties to perform or usually did perform before such hour, it was said he was entitled to a reasonable margin of time in arriving at his place of work, and the question of his being in the service at the time was a question for the jury.¹

3214. Where a person standing on the wharf was employed by the mate of a vessel to assist in loading some goods, the service continuing about two hours and a half, and in obedience to directions he went to the office, which was on the boat, to get his pay, and then started to go ashore, and while crossing the gang-plank the hands recklessly pulled the gang-plank from under him, causing him injury, the question being whether he was a servant of the company at the time, the facts being undisputed, it was held that such question was a proper one for the jury, and having been submitted and found that he was not, judgment for the plaintiff was affirmed.²

3215. Where a section-hand when injured was upon his hand-car, proceeding after his day's work was done on another part of the road than that on which his duties required him to work, at the request of his foreman, on business personal to the foreman, it was held the company was not liable.³

3216. An employee cannot be said to be out of the line of his duty because he chooses to remain upon the car with which he is working or in connection therewith at the noon hour.⁴

3217. Nor because he goes into a building to warm himself during working hours.⁵

3218. Where an employee in the defendant's yard, while walking on the track after his day's work was done, going

¹ Walbert v. Trexler, 156 Pa. St. 70 Pa. St. 477; Baltimore & Ohio R. Co. v. Trainor, 33 Md. 542. 113.

² Packet Co. v. McGue, 17 Wall. 508. ⁴ Evansville & R. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345.

³ Hurst v. C., R. I. & P. R. Co., 49 Iowa, 76. See, also, Baird v. Pettit, ⁵ Parkinson Sugar Co. v. Riley, 50 Kan. 401, 31 Pac. 1090.

to his home, was killed, presumably by a train running over him, and it appeared that his foreman had told him that at any time he was going over the road to notice the track closely, and if anything was found wrong to let him know, it was held that he was not on duty at the time of the accident. That such general direction cannot be construed as an order to go upon the track for such a purpose outside of his general employment.¹

3219. A demurrer to a paragraph of a complaint, setting up that the injury was done during the noon hour, was properly overruled, for plaintiff was not out of the line of his duty simply because he remained on the car during the noon hour, which may have been necessary in order that he might be ready for duty when the hour expired.²

3220. The fact that plaintiff's decedent was advised by a vice-principal of defendant not to work beyond a certain hour for fear that he could not work on the factory the next day, but that he worked longer, was held not to sever the relation of master and servant between defendant and plaintiff's decedent or show contributory negligence on his part.³

3221. The plaintiff was foreman of a bridge gang in the employ of the defendant. About three o'clock on the morning of the day of the accident he was asleep in the bunk of his sleeping-car provided by the company for the purpose. Trainmen in the employ of the defendant ran the train onto the side-track with considerable speed, throwing him from the bunk, causing him injury. It was held that he was to be considered on duty at the time. He was subject to the call of the company at any time.⁴

3222. Where an employee in a bridge gang, who worked by the day and lived in a car provided by his employer, was injured in a collision after his day's work was done, and while in his car engaged with his own affairs, it was held he

¹ *Baker v. C., R. I. & P. R. Co.* (Iowa), 63 N. W. 667.

² *Evansville & R. R. Co. v. Mad-
dux*, 134 Ind. 571, 33 N. E. 345.

³ *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094.

⁴ *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 10 S. W. 529.

was in the employment of the company at the time of the accident and was a fellow-servant with the workmen in the transportation department.¹

3223. Where plaintiff's intestate had been in the employ of defendant railroad company as a section-hand working by the day, but was not at work on the night when he was run over and killed, and did not work the preceding day, it was held he was not in the defendant's employ at the time of the injury, and the court properly refused to submit the question of employment to the jury.²

3225. A substitute hired by an employee stands in the employee's place, with all its responsibilities, so far as the master is concerned, and a fellow-servant with the employee is a fellow-servant with the substitute.³

E. Servants Injured on a Train or Vessel When Not Employed Thereon.

3226. Where a laborer was being carried to and from his place of work upon the trains of the defendant without compensation, and was injured by the negligence of the operators upon one of such trains, it was held that the relation of master and servant existed between the employer and himself, and that the operatives who caused him injury were his fellow-servants. It was said: If by the terms of his contract of service he was thus to be transported, then the injury was received while engaged in the service for which he was employed. If it be not properly inferable that such was the contract, it leaves the case to stand as a permissive privilege granted to plaintiff, of which he availed himself to facilitate his labors and service, and is specially connected with it and with the relation of master and servant, and therefore furnishes no ground for maintaining an action against the master.⁴

¹International & G. N. R. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219.

²Cincinnati, N. O. & T. P. R. Co. v. Conley's Adm'x (Ky.), 20 S. W. 816.

³Anderson v. Ginneau, 9 Wash. 304, 37 Pac. 449.

⁴Gilshannon v. Stony Brook R. Corp., 10 Cush. 228; Gilman v. Eastern R. Corp., 10 Allen, 233.

3227. Where the foreman of a gang of men employed in repairing the track of a railroad company ordered them to quit work at fifteen minutes before the usual hour and take a train which was to carry them to a certain station, without payment of fare, according to a monthly custom, to receive their wages, and one of the men, while running along the track to get on the train, was struck and injured by a hand-car operated by another gang in the employ of the same company, it was held he was in the service of the corporation at the time he was injured; hence his injuries were caused by the act of fellow-servants.¹

3228. An employee on a gravel train, injured by the negligence of the engineer while being conveyed to his home, was held to be in the service of the company. The engineer was his fellow-servant.²

3229. Where a laborer upon a gravel train was injured while being carried upon such train from his place of work, and gave no part of his wages for his fare, and did not travel as a passenger, it was held he was at the time he was injured an employee.³

3230. Where an engineer in the employ of a railroad company was injured while riding upon a train other than the one used in connection with his duties, simply for his own convenience, he was, so far as his right of recovery from the company was involved, a stranger.⁴

3231. Where an employee of a railroad company, acting in the capacity of baggage-master, conductor of passenger and gravel trains as directed, was ordered to go to a station and take charge of a train the next day, and went beyond such station, and in coming back to such place to take his train, upon one of the company's trains, was injured through the negligence of the operatives of such train, it was held that the operatives were his fellow-servants though he had

¹O'Brien v. Boston & Albany R. Co., 138 Mass. 387.

²Russell v. Hudson R. R. Co., 17 N. Y. 134.

³Ryan v. Cumberland V. R. Co., 23 Pa. St. 384.

⁴Washburn v. Nashville, etc. R. Co., 3 Head (Tenn.), 638.

no duties to perform in connection with the operation of such train.¹

3232. Where a railroad company engaged in ballasting its road employed a hand to assist in loading and unloading a gravel train, and in the execution of his service it was necessary for him to ride on the train from the gravel pit to the place of unloading, the train being run under the direction of a conductor, and said hand having nothing to do in its management, it was said he was a mere employee and did not assume the character of a passenger.²

3233. The general rule is that a master can only set up the relation of master and servant as a defense to an action by a servant where the injuries were received while engaged in his employment. If the master's negligence is a matter extraneous to his specific employment, or if the injuries be received at a time when the servant is not engaged in his duties, then the servant occupies the position or *status* of a stranger. But this rule has no application where, by the terms of the contract, express or implied, it appears that traveling on the cars constitutes a part and portion of the contract of service. In such case the person injured must be regarded as a servant or employee, and the company in whose employment he is at the time engaged is not responsible for the injury.

The facts were that a foreman of defendant's shops was injured while riding upon one of its trains going to his place of work from his home. The arrangement between the company and the men was that they were to be taken to Buffalo on Monday mornings and brought back Saturday evenings in the defendant's car. No fare was required of them, but a deduction was made from their wages at an amount fixed per hour, being the same as when at work, for the time when they were upon the train, their wages beginning when they reached the shops at Buffalo and ending

¹ *Manville v. Cleveland & Toledo R. Co.*, 11 Ohio St. 417.

² *Kumler v. Junction R. Co.*, 33 Ohio St. 150.

when they left them. *O'Donnell v. Railway Co.*, 59 Pa. St. 239, was disapproved and said not to be sound law.¹

3234. Where an employee was given tickets to and from his home and place of work, which were considered a part of his contract of employment, and he received an injury while riding upon the trains of his employer through the negligence of its servants, and while he was using one of such tickets, though at the time he was not going to or returning from his work, but was riding for his own convenience, it was held that he was not to be considered an employee but a passenger. So long as he was working from day to day for the defendant, it might be said that he was in its employment, but when not so traveling for a purpose connected with his duties of service he was not to be considered an employee.²

3235. Where an employee is carried to and from his place of work in consideration of a deduction from his wages, then he stands in the same relation as any other person paying fare, and while on his journey he is acting independent of his employment and therefore cannot be considered at such time an employee.³

3236. The general rule does not apply to the servants of contractors employed in the construction of the road of the company. They are in no sense servants or employees of the company; they are passengers.⁴

3237. The mere fact that the conductor of a train neglects or fails to collect fare of one in the employment of a railroad company, of itself cannot have the effect to charge such employee with the relation of servant, when he is not actually employed on the particular day and is riding for his own convenience merely.⁵

¹ *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267.

² *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770.

³ *O'Donnell v. Railway Co.*, 59 Pa. St. 239.

⁴ *Graham v. Toronto, etc. R. Co.*,

23 Upp. Can. (C. P.) 541; *Torphy v. Railway Co.*, 20 Upp. Can. (G. B.) 546; *Sherman v. Railway Co.*, 34 Upp. Can. (G. B.) 451.

⁵ *Ohio & M. R. Co. v. Muhling*, 30 Ill. 23.

3238. Nor can the conductor change the relation of one who is a servant at the time to that of a passenger by receiving and treating him as such.¹

3239. If an employee is hired by the day and has no labor to perform on Sunday, he cannot be said to be a servant while not performing labor for his master on that day, and if he chooses to ride upon the train of his employer on such day for his own convenience or pleasure, even upon a pass which he has as an employee, and is injured, it cannot be said that he was at such time, under such circumstances, a servant of the company.²

3240. The general rule is that one who is hired by the day, week or year is just as much in his employer's service in going to and from his work under privileges granted by the master and accepted by the servant as when actually engaged in the work itself.³

3241. Where a woman who was employed by a person as a laundress, while being conveyed, either gratuitously or as a part of the contract of employment, from her house to that of her employer in his wagon, the driver being his coachman, was injured by the negligence of such driver, it was held that she was to be regarded as in the service of her employer at the time of the accident and a fellow-servant of the coachman.⁴

3242. It was held that a person employed as a detective, and authorized to ride upon defendant's hand-car, was such an employee in his service that he could recover for injuries caused by the unfitness of such means of conveyance or by any negligence of the defendant's servants in operating such car, or from any defect in the track which may have caused him injury.⁵

¹ *Texas & Pacific R. Co. v. Scott*, 64 Tex. 549; *Sherman v. Railway Co.*, 72 Mo. 62; *Balt. & Ohio R. Co. v. State*, 41 Md. 268.

² *State v. Railway Co.*, 63 Md. 433.

³ *Abend v. Railway Co.*, 111 Ill. 203.

⁴ *McGuirk v. Shattuck*, 160 Mass. 45.

⁵ *Pool v. C., M. & St. P. R. Co.*, 53 Wis. 658.

*F. Servants of Another, Working Upon Trains or Vessels,
Injured Thereon.*

3243. It was said that where an express company hires its freight transported on the steamer and railroad of a company engaged in such business, and hires an agent to take charge of such freight, whose passage is paid for in the contract, such agent occupies the position of an ordinary passenger, as respects the liabilities of the company for injuries he may sustain, caused by the negligence of its employees; and where such person rents from such company a room upon its boat for selling liquors and cigars, at a stipulated rent, such company to carry and board him as a part of the contract, that does not change his relation. The operating a bar on his own account was disconnected from his employment as agent of the express company, and if he received an injury through the negligence of the servants of the company, the rule applicable to passengers would apply.

This was said where the person occupying such position, while standing upon the platform of a station, in the act of boarding a baggage-car of the defendant, was injured by the explosion of the boiler of the engine attached to the train.¹

3244. It was held that an express messenger upon a train, under a contract between the railroad company and the express company, was not to be considered an employee of the former, and did not, by reason of such position, assume the risks resulting from the negligence of the railroad company or its operatives in the management of its trains.²

3245. Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants' negligence to persons traveling upon its trains as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. One temporarily supply-

¹ *Youmans v. Contra Costa S. N. Co.*, 44 Cal. 71.

² *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585.

ing the place of an express messenger stands in the same position with him and is entitled to the same protection.¹

3246. A postal clerk injured while riding upon the train of a railroad company in the performance of his duties as such was held not to be an employee of the railroad company. It was said: He occupies as advantageous a position as a passenger, if in fact he is not one. (*Price v. Railroad Co.*, 113 U. S. 218, and *Railroad Co. v. Price*, 96 Pa. St. 256, distinguished.)²

3247. It was held that the relation of a postal clerk upon a railway train was the same as that of a passenger; that is, the company owed him the same duty in respect to the condition of its appliances and method of operating its trains.³

3248. It was said that a passenger, in the legal sense of the word, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, such as the payment of fare or that which is accepted as an equivalent therefor. A route or mail agent riding upon a train for the discharge of his duties is not a passenger, but comes within the provisions of the act of April 4, 1868, relating to persons not employed, lawfully engaged or employed on or about the roads, works, etc., of a railroad company.⁴

3249. Where, at the request of the owner of a freight-car, the agents of a railroad company attached his car to a pas-

¹ *Blaiz v. Erie Ry. Co.*, 66 N. Y. 313; *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Jennings v. Grand Trunk R. Co.*, 15 Ont. App. 477; *Brewer v. N. Y., L. E. & W. R. Co.*, 124 N. Y. 59.

² *Magoffin v. Missouri Pac. R. Co.*, 102 Mo. 540.

³ *Libby v. Maine Central R. Co.*, 85 Me. 34. See, also, *Hammond v. Northeastern R. Co.*, 6 S. C. 130.

⁴ *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256; *Price et al. v. Pennsylvania R. Co.*, 113 U. S. 218; *Magoffin v. Missouri Pac. R. Co.*, 102 Mo. 540, 15 S. W. 76; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280; *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165; *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116; *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 16 S. W. 849; *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562; *Hammond v. N. E. R. Co.*, 6 S. C. 130; *Houston & T. C. R. Co. v. Hampton*, 64 Tex. 427.

senger train contrary to the instructions and rules of the company, he agreeing to run all risks and also to attend the brakes on his car, it was held this did not constitute him a person in the employment of the company, so as to prevent him from bringing suit against the company for damages for negligence in the operation of such train whereby he was injured.¹

3250. It was held that a stevedore employed by another who has contracted to unload a vessel can recover for injuries sustained by defective appliances furnished him by the vessel, upon the same evidence which would enable his employer to recover; though there is no privity of contract between the ship-owner and him, they were under the same obligations to him as they were to his employer. What would be negligence to one would be negligence to the other.²

3251. A statute of Pennsylvania provides in substance (Act of April 4, 1868, P. L. 58) that any person engaged or employed on or about the roads, depots, premises or cars of a railroad company, not being a passenger or employee, shall only have such right of action and recovery against the company for personal injuries as would exist if such person were an employee. It was held in reference to a newsboy who was permitted to sell papers on the cars of a railroad company, that he was not within the provisions of the act. That the persons who were in contemplation by the legislature are those who, though not employees of the company, are nevertheless engaged or employed on or about the company's roads or works in the performance of some act connected therewith.³

3252. One who travels upon a train selling articles under a contract with the company to pay a sum annually for the

¹Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382. See, also, Lockhart v. Lichtenthaler, 46 Pa. St., 151.

²The Rheola, 19 Fed. 926. *Contra*, The Dago, 31 Fed. 574.

³Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816.

privilege, but who is also to supply passengers with ice water, is to be considered a passenger upon the train and not an employee.¹

G. *Volunteers.*

3253. If a person undertakes voluntarily to perform service for a corporation, and an agent of the corporation assents to his performing such service, he stands in the relation of a servant of the corporation while so engaged. This was held as to a boy who volunteered to go upon an errand for the defendant's station agent.²

3254. One who, at the request of the man in charge, temporarily assists in the defendant's work, not expecting any pay, is for the time being a servant of the defendant, and entitled to the same protection as any other servant.

Where an employee was injured while assisting defendant's servant in the matter of laying a pipe in a trench, it was said by the court: He was not a trespasser; he was a volunteer in the sense that the employment was voluntary. He became, however, a servant by the request of the foreman, entitled to the same protection, and probably subject to the same risks, as other servants in the defendant's employ.³

Upon a subsequent appeal it was held that the foreman was his fellow-servant.⁴

3255. An employer (the defendant in the action) was delivering a heavy fly-wheel to a third person at the latter's factory, and an employee of the latter, assisting either voluntarily or at the request of the former's foreman, or in obedience to the directions of the latter's foreman, was injured by the act of the defendant's foreman. It was held that if he was a mere volunteer, that is, assisted entirely on his own motion, the defendant would not be liable. If he assisted at the request of the defendant's foreman he was in

¹ Commonwealth v. Vermont & M. R. Co., 108 Mass. 7.

³ Johnson v. Ashland Water Co., 71 Wis. 553.

² Barstow v. Old Colony R. Co., 143 Mass. 535.

⁴ Johnson v. Ashland Water Co., 77 Wis. 51.

no better position than a mere volunteer. It was said: A servant cannot by any act of his impose upon his master a higher liability for negligence than the master is under to the servant himself. Nor is the defendant's liability in any manner increased by the fact that the injured employee joined in the service in obedience to an order from his superior.¹

3256. Where a passenger upon a street-car, at the request of the driver, assisted in placing a derailed car on the track and was injured by the carelessness of the driver on another car of the defendant, it was held that such passenger did not engage in the service as a mere volunteer, nor did he become a fellow-servant with the negligent driver.²

3257. Where the plaintiff's evidence showed that he put himself under the conductor to work his way instead of paying his fare as a passenger, and that without the conductor's instructions he took orders from a brakeman to couple a car to the train and was injured while so doing, the injury being due to the temporary effects of cold weather on the couplings and not to any fault or negligence of the employees of the company, it was held a nonsuit was proper.³

3258. It was said: The distinction running through all the cases is this: that where a mere volunteer, that is, one who has no interest in the work, undertakes to assist the servants of another he does so at his own risk. In such a case the maxim *respondeat superior* does not apply. But where one is employed in another capacity, and at the request of or with the consent of another's servants undertakes to assist him, he does not do so at his own risk, and if injured by their carelessness their master is responsible. In such a case the maxim *respondeat superior* does apply. The hinge upon which the cases turn is the presence or absence of self-interest. In one case the person injured is a mere intruder

¹ Wischam v. Richards, 136 Pa. St. 109.

³ Sparks v. Railway Co., 82 Ga. 156, 8 S. E. 424.

² Street Ry. Co. v. Bolton, 43 Ohio St. 224.

or officious intermeddler. In the other he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master expose him to injury from the carelessness of the master's servants.¹

3259. It was said by the same court that it makes no difference in regard to the liability of the defendant that the injured employee came into the service voluntarily, as to assist the defendant's servants in a particular emergency, and was injured by their negligence; for by volunteering his services he could not have greater rights, nor could he impose any greater duty on the defendant than would have existed had he been a hired servant.

The same rule is applicable if a servant of his own motion, at the request of a fellow-servant, should undertake temporarily to perform the duties of a fellow-servant.

The facts were that the master of defendant's ferry-boat, whose duty it was to transport cars across a river, at the request of a conductor of one of defendant's trains attempted to uncouple cars and was killed.²

3260. A construction train of defendant, in charge of a conductor, having pulled into a station, the conductor temporarily left the train to attend to his usual duties at the station, leaving the trainmen to attend to some switching under the direction of the head brakeman. The plaintiff, a bystander at the station, got on the cars to assist in switching, and while doing so sustained injuries caused by the movement of certain car trucks which were loaded on one of the cars and which were not properly blocked. It was held that the brakeman had no authority to employ additional men to assist in the switching. The fact that the existing force might have been insufficient to do the work did not, under the circumstances, give him any implied authority to do so; that if any one on the ground had such authority it was the conductor. The plaintiff was a mere

¹ Welch v. Maine Cent. R. Co., 86 Me. 552.

² Osborne v. Knox & Lincoln, 68 Me. 49.

volunteer, and assumed all the risks of the situation. The defendant did not bear to him the relation of master or employer and owed him no such duty.

The court distinguished the case under consideration from the classes of cases referred to. The first, that where a brakeman is absent and the proper and safe management of the train so requires, the conductor in charge has authority to supply the place of the absent brakeman. Such were the cases of *Sloan v. Railway Co.*, 62 Iowa, 728, and *Railway Co. v. Prospect*, 83 Ala. 518, 3 So. 764. The second, in case of sudden emergencies, where the safety of the train demands extra help, it is within the implied authority of the conductor to employ them. The third, where one assists the servants of another at their request for the purpose of expediting his own business or that of his master. Such are *Euson v. Railway Co.*, 65 Tex. 577; *Railway Co. v. Bolton*, 43 Ohio St. 224.

The decisions in the latter class of cases are placed upon the ground that, though performing a service beneficial to both, the party is doing so in his own behalf, and not as the servant of the company, and is entitled to the same protection against its negligence as if attending to his own affairs.¹

3261. If a person volunteers to assist the servant of another, the master as such owes him no duty; he assumes all the ordinary risks incident to the situation, and he cannot recover from the master for an injury caused by a defect in the instrumentalities used, or by the mere negligence of the servants. If, however, after discovering that such volunteer has placed himself in a position of danger, even through his own negligence, the servants fail to exercise reasonable care to avert the danger, the master will be liable. This liability does not rest on any contract obligation, but on the general duty not to inflict a wanton or wilful injury on another. As respects this duty, a volunteer occupies at least as favorable a position as a trespasser.

¹Church v. C., M. & St. P. R. Co., 50 Minn. 218, 52 N. W. 647.

The facts were that a boy, at the request of the conductor, assisted in uncoupling cars while cars were being kicked in on the side-track, and was injured.¹

3262. Where the plaintiff testified that the defendant's train-dispatcher, to whom he had applied for a position as brakeman, had told him he should have the next place that was open, and that in the meantime he should assist the station agent at the station where he had lived, as he had been doing before (but voluntarily and without pay); that thereafter he did assist said agent by doing various things under his direction, and such agent gave him a switch key so that he could open and close switches; that on the day of the accident the agent's regular assistant was absent and the agent requested the plaintiff to help him out, and that he was injured while riding to a switch for the purpose of closing it, in that he was standing upon the steps of the cars, leaning outward, prepared to jump from the car while in motion, and his body came in contact with cars left close to the main track upon a side-track, and there was testimony tending to show that the station agent had authority to employ a helper in the absence of any of the regular force, though this was denied, and the agent denied he had employed the plaintiff or requested his assistance, it was held the evidence was sufficient to sustain a finding by the jury that the plaintiff was at the time in the employ of the defendant.²

3263. A conductor has implied authority in case of an emergency to employ a person to assist in operating the train; yet simply asking an employee, not connected with service on the train but who is riding thereon at the time for his own convenience, to perform a single act, such as making a coupling, does not thereby create the relationship of master and servant as to such act.³

¹ *Evarts v. St. Paul, M. & M. R. Co.*, 56 Minn. 141, 57 N. W. 459. ³ *McDaniel v. Railway Co.*, 90 Ala. 64, 8 So. 41; *Sloan v. Railway Co.*, 62 Iowa, 728, 16 N. W. 331.

² *Button v. C., M. & St. P. R. Co.*, 87 Wis. 63.

3264. More is essential than a mere request or order to couple cars at a time or place, or doing a single act, to constitute employment within the scope of the implied authority of the conductor. It must be to render service to some extent continuous in its nature.¹

3265. Where railroad employees organize a volunteer fire company, and the railroad company furnishes apparatus for the use of the firemen, permits them to drill at regular intervals during work hours, without deducting time, and allows the chief, a machinist, an hour each week to inspect the shops as a precaution against fire, it is the chief's duty, in case of fire, to aid in extinguishing it, and in so doing he acts as an employee.²

3265a. Physicians.—The relation of master and servant does not exist between a railroad company and a physician employed by it to attend employees who may be injured.³

3265b. Where a railroad company employs a physician to treat its employees gratuitously, exercising due care in the selection, it is not liable for acts of negligence of such physician in the treatment of such employees.⁴

H. Public Officers and Municipalities — Liability of.

3266. Public officers.—The relation of master and servant does not exist between the superintendent of a county hospital and the inmates thereof.⁵

3267. Nor between a city and the members of its fire department; nor is a city liable for their acts in the line of their duty.⁶

¹ *Railway Co. v. Propst*, 83 Ala. 518, 3 So. 764, 4 So. 711.

² *Collins v. Cincinnati, N. O. & T. P. R. Co.* (Ky.), 18 S. W. 11.

³ *Quinn v. Kansas City, M. & B. R. Co.*, 94 Tenn. 713, 30 S. W. 1036.

⁴ *York v. C., M. & St. P. R. Co.* (Iowa), 67 N. W. 574; *Eighmy v. Railway Co.* (Iowa), 61 N. W. 1056;

Railroad Co. v. Price (Fla.), 13 So. 638; *Railroad Co. v. Howard* (Neb.), 63 N. W. 872; *Railroad Co. v. Zeiler*, 54 Kan. 340.

⁵ *Schrubbe v. Connell*, 69 Wis. 476.

⁶ *Hayes v. City of Oshkosh*, 33 Wis. 314; *Wilcox v. City of Chicago*, 107 Ill. 334.

3268. The grounds of exemption from liability are that the corporation is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community. That the members of the fire department, although appointed by the corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable, but they act rather as public officers or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given, and hence the maxim *respondeat superior* has no application.¹

3269. Where a municipal corporation elects or appoints an officer in obedience to an act of the legislature to perform a public service in which the town has no particular interest, and from which it derives special benefit or advantage in its corporate capacity, but which it is bound to perform in pursuance of a duty imposed by law for the general welfare of its inhabitants or of the community, such officer cannot be regarded as the servant or agent of the town, for whose negligence or want of skill in the performance of duties a town or city can be held liable. To the acts and conduct of an officer so appointed or elected the maxim *respondeat superior* is not applicable.²

3270. As a general rule municipal corporations are not liable to a suit, except where the right of action is given by statute. They are usually termed *quasi*-corporations, and are distinguished in many respects from proper aggregate corporations.³

3271. *Quasi*-corporations created by the legislature for the purpose of public policy are subject by common law to

¹ Hayes v. City of Oshkosh, 33 Wis. 314.

³ Riddle v. Proprietors of Locks and Canals, 7 Mass. 169.

² Hafford v. New Bedford, 16 Gray, 297.

an indictment for the neglect of duties enjoined upon them, but are not liable to an action for such neglect unless the action be given by the statute.¹

3272. A town is not liable to individuals for its neglect or omission to perform or its negligent performance of those duties which are imposed upon all towns without their corporate assent and for public purposes, unless the right of action be conferred by statute.²

3273. A town which has assumed the duties of a school district is not liable for an injury sustained by a scholar attending the public schools from a dangerous excavation in the school-yard, owing to the negligence of the town officers.³

3274. A town is not liable where the imperfect construction of a town-house causes injury.⁴

3275. A town is not liable for an injury sustained by reason of the negligence of a laborer employed by one of its highway surveyors to aid him in the performance of the duties of his office.⁵

3276. Cities are not liable for the negligent acts of the members of their fire department. It is not essential that the doctrine of the exemption of cities from liability should be placed on the ground that the service is being rendered in pursuance of the requirements of law. The exception to the rule obtains even where there is a voluntary exercise of power given by the statute, and may well rest upon the ground of public policy which would forbid the existence of such liability.⁶

3277. A municipal corporation is not liable for the negligence of firemen while engaged in the discharge of their duties. The members of its fire department act not as its

¹ *Mower v. Leicester*, 9 Mass. 247; *Adams v. Wiscasset Bank*, 1 Green, 541.

361; *Farnum v. Concord*, 2 N. H. 392; *Baxter v. Winooski Turnpike*, 27 Vt. 123.

² *Mitchell v. City of Rockland*, 52 Me. 118.

³ *Bigelow v. Randolph*, 14 Gray, 541.

⁴ *Eastman v. Meredith*, 36 N. H. 284.

⁵ *Walcott v. Swampscott*, 1 Allen, 101.

⁶ *Wilcox v. City of Chicago*, 107 Ill. 334.

servants or agents, but as officers charged with a public service, for whose negligence therein no action lies against it.¹

3278. A police officer is not a servant of the city which appoints him in any such manner as to take away his right of action against it for an injury by reason of a defective highway.²

3279. A city is not liable for an assault and battery committed by its police officers, even though it was done in an attempt to enforce an ordinance of the city. They can in no sense be regarded as agents or servants of the city. Their duties are of a public nature.³

3280. A municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred upon the corporation or its officers for the public good. Hence it was held that a prisoner committed to the work-house, who while at work was kicked by a vicious mule which the work-house superintendent directed him to harness, could not recover of the city for injuries so received, even though the superintendent knew the mule was vicious.⁴

3281. A person employed and paid by one who has contracted with a town to light and take care of its street lamps is not a servant or agent of the town, and if, while engaged in his work, he suffers injury from a defect in the highway, he can maintain an action therefor against the town.⁵

3282. Neither the relation of master and servant nor principal and agent exists between a town and its health officers. Nor is the town liable for their unlawful or negligent acts.⁶

3283. Where, however, the city engages in the construction of a special work and employs a superintendent and

¹Smith v. City of Rochester, 76 Mo. 138; Jefferson County v. St. Louis County, 113 Mo. 619. N. Y. 506.

²Kimball v. City of Boston, 1 Allen, 417. ⁵Eaton v. Inhabitants of Woburn, 127 Mass. 270.

³Buttrick v. Lowell, 1 Allen, 172. ⁶Mitchell v. City of Rockland, 53

⁴Ulrich v. City of St. Louis, 112 Me. 118.

laborers to perform the same, the maxim *respondet superior* does apply.

It was held that where an employee was killed by the negligence of a superintendent employed to superintend and construct a cistern wall for the use of its fire department, in the manner of construction of such wall, his administratrix could maintain an action against the city. It was said: It was the legal duty of the city to construct cisterns for fire purposes and it was engaged in an attempted performance of this duty, through its own private agencies and not through the fire department or its officers or other officers of the city whose duty it was to perform such work. In this lay the distinction between this case and *Hayes v. City of Oshkosh*, 33 Wis. 314.¹

3284. A city government cannot legally ratify the negligent, careless or tortious acts of its officers, knowing them to be such, so as to make the city liable therefor.²

I. *Receivers, Liability of.*

3285. While a receiver of a railroad may be protected from an action at law in respect to the property in the possession of the court or in his hands as its receiver, or from the consequences of any accident occurring in its management, as to other property, the management of which he has voluntarily assumed and over which the court has no control, he is responsible individually for its careful and proper management. This was said where an employee was injured while at work upon a connecting line which the receiver of a road had leased by permission of the court.³

3286. It was said: Receivers of a railroad, holding possession for a court of chancery and operating the road under the orders of that court, are not subject to a suit in their

¹ Mulcairnes, Adm'x, v. City of Allen, 172; Boone v. Utica, 2 Barb. Janesville, 69 Wis. 24. 111; Hodges v. Buffalo, 2 De Witt,

² Mitchell v. City of Rockland, 52 113.

Me. 118; Perley v. Georgetown, 7 ³ Kain v. Smith, 80 N. Y. 458. Gray, 464; Buttrick v. Lowell, 1

official capacity for a personal injury to one of their employees, resulting from the negligence of other of their employees in the same service. The code abolishing the common-law rule as to fellow-servants does not embrace employees of receivers,—only those of railroad companies.¹

3286a. The Kansas statute (par. 1251) applies to receivers operating roads.²

J. *Convicts.*

3287. Where a criminal in a state prison was injured by the fall of a defective staging in a building which was being constructed by the defendants, who had engaged the plaintiff's services from the prison authorities, and after his release from the prison he brought an action against such defendants, it was held that the action could be maintained; that the relation of master and servant existed; but that he could not recover for his liability to labor during the period of his imprisonment.³

3287a. The relation of master and servant does not exist between a contractor of prison labor and a convict, the convict being in charge of the contractor as keeper. A convict is not therefore the fellow-servant of employees of the contractor, not convicts, engaged in the same work.⁴

3287b. A chain-gang boss was held not the fellow-servant of a chain-gang prisoner, and the employer of such boss liable for the latter's negligence in causing injury to such prisoner.⁵

¹ Henderson v. Walker et al., 55 Ga. 481; Thurman v. Cherokee R. Co., 56 Ga. 376.

⁴ Buckelew v. Tenn. Coal, Iron & R. Co. (Ala.), 20 So. 606.

² Rouse v. Hornsby, 67 Fed. 219.

⁵ Boswell v. Barnhart, 96 Ga. 521, 23 S. E. 414.

³ Dalheim v. Lemon et al., 45 Fed. 225.

CHAPTER XVIII.

RULES.

- A. *Master's Duty to Make*, 3288 et seq.
- B. *Pleading of—When Admissible as Evidence*, 3310 et seq.
- C. *Publication of*, 3317 et seq.
- D. *Reasonableness and Sufficiency of*, 3325 et seq.
- E. *Knowledge by Servant*, 3342 et seq.
- F. *Enforcement—Waiver of*, 3362 et seq.
- G. *Failure to Observe by Servant Injured*, 3392 et seq.
 - 1. Prohibiting Going Between Cars, 3405 et seq.
 - 2. Prohibiting Boarding Moving Cars, 3415 et seq.
 - 3. Prohibiting Flying Switches, 3418 et seq.
 - 4. Requiring Use of Coupling Sticks, 3422 et seq.
 - 5. Requiring Examination of Appliances, 3436 et seq.
 - 6. Requiring Section-men to Flag Curves, 3445 et seq.
 - 7. Protection of Car-repairers, 3448 et seq.
 - 8. Regulating Speed of Trains, 3452 et seq.
- H. *Failure to Observe by Servant Who is to Execute*, 3456 et seq.

A. *Master's Duty to Make.*

3288. Where the nature of the business requires it, a corporation or others are required to carry on the business under a proper system and under reasonable rules and regulations, and if through a failure to establish such a servant is injured they are liable. The duty is one personal to the master.¹

3289. In making rules for the government of its employees a railroad company is only bound to use ordinary care and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care. It cannot be assumed that

¹ Ford v. L. S. & M. R. Co., 124 91 N. Y. 332; Slater v. Jewett, 85 N. Y. 493; Dana, Adm'x, v. N. Y. N. Y. 61; Rose, Adm'x, v. Boston C. & H. R. R. Co., 92 N. Y. 639; & Albany R. Co., 58 N. Y. 217. Sheehan v. N. Y. C. & H. R. R. Co.,

it can by rule guard against and prevent every injury to them. This was said where it was claimed that a rule should have been promulgated requiring the exhibition of lights by night and flags by day when cars are to be coupled on sidings, the same as is required when a car is being repaired on a track.¹

3290. It is the duty of railroad corporations to prescribe, either by means of time-tables or other suitable modes, regulations for running their trains with a view to better safety, but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation can personally oversee and as to which employees must be relied upon. This was said in reference to a charge of negligence in sending out two trains close together; and because it did not affirmatively appear whose act caused the injury, whether one representing the personal duty of the master or one merely a fellow-servant, a judgment for the plaintiff was reversed.²

3291. The law does not require a railroad company to direct the movement of its trains by orders from the train-dispatcher alone, nor by a system of signals only, nor does it require a company to adopt any particular form of orders or any particular system of communicating them; but the company has the right to direct the movement of its trains by train orders alone, or by train orders of any form and signals, or by signals alone, or by time-card alone, provided the means adopted are brought to the knowledge of its employees and they are reasonably well calculated to secure the safety of the men, if obeyed by them. Such a company is not required to change its orders or signals for the movement of trains because some other railroad has adopted a different system of orders or signals; and a railroad com-

¹ *Berrigan v. N. Y., L. E. & W. R. Co.*, 131 N. Y. 582. See, also, *Morgan v. Hudson River O. & I. Co.*, 133 N. Y. 666.

² *Rose, Adm'x, v. Boston & Albany R. Co.*, 58 N. Y. 217.

pany may even have in use a system of orders or signals shown to be less safe than those adopted by another railroad, without being liable to its employees for the consequences of the use of such orders or signals, if the orders and signals in use are reasonably well calculated to secure the safety of employees of the company, if obeyed by them. Negligence in this respect cannot be predicated upon proof that another company had adopted a different order for the operation of its trains.¹

3291a. It is a positive duty on the part of a railroad company to frame and promulgate such rules and schedules for the moving of its trains as will afford reasonable safety to the operatives who are engaged in moving them, and for the failure to perform which it will be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. This is a personal duty; and while a corporation is compelled to act through agents, yet the agents in performing duties of this character stand in the place of and represent the principal. In other words, they are vice-principals. Such being the duty, it follows logically that when schedules are departed from, or when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in running such trains. This was said where the schedules upon which trains were accustomed to run were interrupted by a special order or direction which resulted in a collision.²

3292. The rule requiring employers to make and promulgate rules was applied where a car-repairer was injured while repairing cars on a track, caused by other cars being shunted against the one upon which he was at work. It appeared that some roads had adopted a rule that a blue flag by day and a blue light by night placed on a car indicated that the car-repairmen were at work underneath, and prohibiting the coupling or moving of a car thus protected,

¹Hannibal & St. J. R. Co. v. Kanahey, 39 Kan. 1, 17 Pac. 324.

²Lewis et al. v. Seifert, 116 Pa. St. 628, 11 Atl. 514.

and that the defendant had not adopted such a rule. It was also held that the fact that the repair-men among themselves had a custom of putting up a red flag in such cases was immaterial, it not appearing that such a rule was promulgated by the defendants, that obedience to it was required, or that it was generally known to engineers.¹

3293. Where a railroad company had not expressly provided by rule as to watchmen guarding an employee engaged in repairing cars on the track, but it appeared that it had become an universal custom for employees to watch and guard a repair-man, and such duty was well understood by them, it was held that such custom thus became a rule of the company as well as an understanding between its employees.²

3294. Where a car-repairer was killed while repairing cars in the yard by other cars moving against the one under which he was at work, caused by the breaking of a coupling-pin, and it was claimed the want of sufficient rules and regulations was the cause of his injury, it was held that the work of moving cars in a railroad yard was of such a nature that it could not be arranged with exactness and governed by rules as in the running of regular trains.³

3294a. In the absence of evidence showing it to be useful or feasible to prescribe rules to govern the shunting of railroad cars, negligence cannot be predicated upon the fact that the rules were not established.⁴

3295. An employee cannot complain of the absence of rules prescribing the course of action of servants where there is a universal custom among employees to the same effect as the rule which such employee demanded.⁵

3296. The existence of a rule cannot be established by mere supposition or understanding of employees. Hence it

¹ Abel v. D. & H. C. Co., 103 N. Y. 581.

⁴ Atchison, T. & S. F. R. Co. v. Carruthers, 56 Kan. 309, 43 Pac. 230.

² Luebke v. C., M. & St. P. R. Co., 63 Wis. 91.

⁵ Rutledge v. Missouri Pacific R. Co., 110 Mo. 312, 24 S. W. 1053; affirmed, 27 S. W. 327.

³ Besel v. N. Y. C. & H. R. R. Co., 70 N. Y. 171.

was held not competent to show by employees that it was generally understood by them that trains should not be operated, while switching, faster than six miles an hour.¹

3297. Independently of rules prescribed by a railroad company, the law implies a duty to give a signal of the movement of an engine under circumstances where such has been the custom.²

3298. It was held to be the duty of a railroad company transporting lumber upon open cars to adopt some system for loading, having regard for the safety of its servants and those traveling over its road, and of all persons who may be in the vicinity of such cars. The facts were that the manner of loading was left to employees — the company furnishing proper stakes which were not used, and an employee being injured by reason of the improper loading of the car without using the stakes.³

3299. One who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management, and his failure so to do is a personal neglect for the consequences of which he will be liable to his servants. It is feasible and proper for railroad companies to have rules and regulations for the government of its employees in making flying switches and in the shunting and kicking of cars for the warning of persons liable to be injured. It was held that a petition which bases a charge of negligence upon the company's failure to adopt such rules states a cause of action.⁴

3300. Where a section-hand, while engaged with others in bolting rails, became so engrossed in the performance of his duties that he did not see an approaching train and was struck by it and injured, and no warning by whistle or bell was given, though all the other employees had warning of its approach, and it appeared there was a rule of the com-

¹James v. Northern Pacific R. Co., 46 Minn. 168, 48 N. W. 782.

²Sobieski v. St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863.

³Ford, Adm'x, v. L. S. & M. S. R. Co., 124 N. Y. 493.

⁴Regan v. S. L., K. & N. W. R. Co., 93 Mo. 348.

pany that such employees should look out for their own safety, it was held that if, under the circumstances of the particular case, a rule providing for warning was necessary, and by the exercise of reasonable care that necessity could have been foreseen, it was the duty of the company to prescribe such a rule. Whether it ought to have so provided was a question for the jury. So was the question of contributory negligence on the part of such employee.¹

3301. Where a fireman was injured while his train was running with the engine reversed, the train becoming derailed by collision with a cow on the track, and such method of operating was necessary by reason of the want of a turntable at a station, it was said, rules forbidding operation of trains in this negligent manner would have been obeyed by defendant's employees, and the accident avoided. The negligence of the defendant, then, is traceable to its failure to provide necessary rules for conducting its business with proper safety to its employees. (The case does not disclose in what particular the manner of running the train was negligent. Presumably it was the rate of speed.)²

3302. Where the petition alleged that the cause of injury to a switchman, who was injured by the cars suddenly moving from an unknown cause as he was proceeding to couple them, was the failure to establish rules or a system of signals regulating its servants in moving cars and coupling them, it was held that no cause of action was stated; that the allegations were inconsistent; that no causal connection appeared between the accident and the failure to have rules.³

3303. It was said that an employee engaged in filling a tank on cars with water while standing on a ladder could not be heard to complain that rules ought to have been established by means of which he could have been warned of the approach of cars to the one upon which he was at work

¹ *Railway Co. v. Murphy*, 50 Ohio St. 135.

³ *Rutledge v. Missouri Pacific R. Co.*, 110 Mo. 312, 19 S. W. 38.

² *Cooper v. Central Ry. of Iowa*, 44 Iowa, 134.

to be coupled thereto, where it appeared that it had been customary for the week he had performed such duties to take a car out at such point while he was doing such work, and he could plainly see, if he had looked, the approach of such cars.¹

3304. Where an employee of a company engaged in the business of roasting ore was injured while under a car used by the company, engaged in removing loose ore from the front of the wheels, by another car coming against the one under which he was at work, and the charge was that his injuries were the result of the neglect of the company to promulgate proper rules regulating the work of the employees, it was said there was nothing in the nature of the business that made it necessary to make and publish rules. It is not suggested what particular rule the defendant could have adopted that would have been likely to prevent the accident. No evidence was given that any rule is in use in business of a similar character, nor was there any evidence by experts or other witnesses to show that any rule was practicable or necessary in such cases. Even if it could be shown, after the accident occurred, that it might have been prevented by adopting and enforcing some particular rule, that would constitute no test of liability. The failure to adopt rules is not proof of negligence unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions.²

3304a. A jury is not justified in finding that a railroad company is negligent in not establishing a system of rules or signals for the giving of notice of the approach of shunted cars in a yard in the absence of evidence that such rules or signals would be useful and feasible.³

¹Houston & T. C. R. Co. v. Strycharski, 6 Tex. App. 555, 26 S. W. 253.

³Atchison, T. & S. F. R. Co. v. Carruthers, 56 Kan. 309, 43 Pac. 230.

²Morgan v. Hudson River O. & L. Co., 133 N. Y. 666.

3305. It was held, where an employee was injured while at work in an elevator, where his work required that he should enter the bins therein, that whether an omission on the part of the master to make rules and regulations prescribing the conditions under which he should be required or permitted to enter the bins at the bottom was negligence, might have been left to the jury.¹

3306. Rules which in terms require that all trains must approach stations with reduced speed and with care; that in approaching switches the greatest care must be taken, not directing what specifically shall or shall not be done, are but the expressions of an engineer's duty at common law, and leave the question, where he is injured by reason of a misplaced switch, one for the jury as to the exercise of proper care on his part.²

3306a. Where a rule of a railroad company places the management and control of trains in the conductor, and another rule requires the train to be kept under control when approaching stations, the latter rule is binding upon the engineer.³

3307. Where a petition alleged, among other things, that a boy of seventeen years was injured, and was at the time in the employ of a railroad company engaged to perform the duties of carrying water for a gang of men engaged in repairing the road-bed and to take care of the tools used by them, under charge of a foreman, such gang being carried in a caboose-car attached to a freight train, and at a point on the line the engineer, fireman and a brakeman, who were not under the control of such foreman, detached the engine, leaving the cars on the main track, and proceeded to get some cars from the side-track to put in the train, and in the meantime the foreman directed the plaintiff to notify the laborers to get out and remove snow from the track, and as

¹ *McGovern v. C. V. R. Co.*, 123 N. Y. 280.

³ *Louisville & N. R. Co. v. Mother-shed* (Ala.), 20 So. 67.

² *Lake Shore & M. S. R. Co. v. Parker*, 131 Ill. 557, 23 N. E. 239.

he was getting off the rear platform, after the men were out, the engineer and brakeman kicked the cars against those in the train, throwing the plaintiff off, and the negligence charged against the defendant was a failure to provide rules or signals or system to be observed by such engineer in operating such locomotive and detached cars so as to give to the occupants of said caboose or to the plaintiff therein some alarm, warning or notice of the approach and impact of said detached cars, and the court having sustained a demurrer to the complaint, it was held error. It was said: In these cases of making a flying switch and of shunting or kicking of cars it is feasible and perfectly proper to have some rules and regulations to warn persons liable to be injured.¹

3308. It was said that it was perfectly feasible to prescribe definite rules for making flying switches, though they may be seldom made.²

3309. Where it is not shown that any rule for the protection of a car-repairer who is injured while at work on cars standing on the track could have protected him, the absence of rules for such protection is immaterial. This was said where car-repairers moved cars so close to the switch that they were struck by an engine on an adjacent track.

It was held proper for the jury to determine from the evidence whether rules should have been established providing for the furnishing of appliances and a system for protecting car-repairers while at work at the particular station. There was some evidence that there was a rule requiring the use of blue flags and blue lamps on cars under which inspectors were at work, and that defendant did not require it to be observed at the station where an inspector was injured by cars being moved against the one under which he was at work.³

¹ Reagan v. St. L., K. & N. W. R. Co., 93 Mo. 348, 6 S. W. 371.

³ Warn v. N. Y. C. & H. R. R. Co., 92 Hun, 91.

² C. & N. W. R. Co. v. Taylor et al., 69 Ill. 461.

3309b. Where there were no rules established for the protection of car-repairers, and one such was injured by an engine on the main track striking other cars on the repair track, which had been pushed by the car-repairers and left too close to the main track, and they in turn struck the car under which the repairer was at work, it was held that the question of defendant's negligence in failing to establish rules was a question for the jury.¹

B. Pleading of—When Admissible as Evidence.

3310. It is not necessary to plead the existence of rules. They are mere evidence bearing upon the question of negligence on the part of the defendant or its employees and the care and diligence of the plaintiff.²

3311. A plea is demurrable that does not allege that the plaintiff had knowledge of the rule therein relied upon. If not demurred to, it presents an issue.³

3312. Rules are admissible in evidence without first showing plaintiff's knowledge of them,—that is a subsequent step in the proceeding.⁴

3313. Rules are not admissible in evidence where the evidence shows that the injured employee was never in possession of printed rules and had no knowledge of them.⁵

3314. Where the plaintiff denied all knowledge of particular rules it was held competent to introduce the rules bearing upon that subject, but not the entire body of rules.⁶

3315. A contract signed by an employee in which is an acknowledgment of the existence of a rule forbidding any

¹ Cumpston v. Tex. & Pac. R. Co. (Tex. App.), 33 S. W. 737.

² Alcorn v. Chicago & Alton R. Co., 108 Mo. 81; Logan v. Railway Co., 77 Mo. 663; Henry v. Railway Co., 66 Iowa, 52. *Contra*, Strong v. Iowa Cent. R. Co. (Iowa), 62 N. W. 799.

³ Memphis & C. R. Co. v. Graham, 94 Ala. 545, 10 So. 283.

⁴ Parker v. Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 232. See Georgia Pac. R. Co. v. Davis, 92 Ala. 300, 9 So. 252.

⁵ Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181.

⁶ Memphis & Charleston R. Co. v. Askew, 90 Ala. 5, 7 So. 823.

attempt to uncouple moving cars is admissible in evidence as showing the conditions of his employment and knowledge of the rule, and such contract is not against public policy because it contains a provision that he assumes the risk from doing the forbidden act.¹

3316. In an action against a railroad company for injuries to an employee, a book of rules of the company is admissible on the issue of negligence by the company to show the absence of provisions for his safety which should have been made, or to show that some of the rules did apply and were violated, or, if not, that provisions were made for the safety of other employees where the risks were similar.²

C. Publication of.

3317. Orders relating to the running of a train were sent by a train-dispatcher by telegraph. It was the duty of the telegraph operator receiving such order, required by the rules, to give to each, the conductor and engineer, the orders thus received. He gave the order to the conductor, who signed the acknowledgment for the engineer, but neither the conductor or operator communicated such order to the engineer, and as a result he proceeded with his train, came in collision with another, and was killed. It was held that the officers of the company had performed their full measure of duty. That the neglect in communicating the special order or rule was that of fellow-servants with the deceased. It was said in reference to the promulgation of rules, that the reasonable rule in such case hath this extent and no more — that the employer must first choose his agents with due care for their possession of skill and competency, and that then he must use his best means of communication according to prescribed general rules and regulations, devised from the best experience in such business, and if among those means

¹Sedgwick v. Illinois Central R. Co., 73 Iowa, 158; Russell v. Richmond & D. R. Co., 47 Fed. 204. ²Texas & N. O. R. Co. v. Tatman (Tex. App.), 31 S. W. 333.

is the service of a fellow-servant, competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering into the service.¹

3318. The rules of a railroad company stand to its employees as laws for the regulation of their conduct, and all such laws ought to be promulgated in some reasonable, practical way. If they are written or printed, each employee should either be furnished with a copy or informed where to apply for them, or at least where he might call and read the rules or hear them read. Of course actual knowledge otherwise acquired would suffice.²

3319. Where rules are prescribed or regulations adopted for the government of employees in and about the discharge of their duties, it is the duty of the employer to give notice of their existence and so to promulgate them as to afford to the employees a reasonable opportunity of ascertaining their terms. Knowledge either express or such as the law will imply without reference to the manner by which it is imparted binds the employee to compliance. If by oral tradition he has knowledge derived from his co-employees of the existence and terms of such rules, he is bound to conform his conduct thereto, whether he have either a copy of the rules or has had an opportunity to read them or hear them read. Therefore a request to charge to the effect that, if the rules be written or printed, each employee should either be furnished with a copy or advised as to where he can read or hear them read, and which leaves out of consideration all other means of acquiring knowledge, should be denied.³

3320. Where a young man sixteen years of age was injured while engaged in painting cars that were located upon a side-track by reason of other cars being pushed against the one upon which he was at work, and the company had provided adequate rules for his protection, which required him to display flags or signals, and the testimony of the boy

¹ Slater v. Jewett, 85 N. Y. 61.

wick & W. R. Co. v. Clem, 80 Ga.

² Carroll v. East Tenn., V. & G. R.

534, 7 S. E. 84.

Co., 82 Ga. 452, 10 S. E. 163; Bruns-

³ Port Royal & W. C. R. Co. v.

Davis, 95 Ga. 292, 22 S. E. 833.

was that he had not been notified of such rules and was ignorant of them, it was said, after a statement of the duty of the defendant to provide adequate rules and means of warning, that it cannot be said that such regulations are established until the company has caused them to be published or brought to the attention of the persons to be affected by them. They certainly cannot bind without promulgation. A railroad company cannot avail itself of a rule which it has not properly published and which it has habitually neglected to enforce.¹

3321. As a general rule it is not the duty of the employer to instruct a servant as to the rules of service, or to warn him of the dangers incident thereto, unless information be asked.²

3322. Where the duty to make rules reasonably sufficient to protect its employees appears, it is a question for the jury whether or not such rules and regulations have been established. This was held in reference to duties involved in making up trains in a yard.³

3323. An employee in the defendant's paint shop was injured while painting cars on a side-track in the defendant's yard by other cars being shoved against one upon which he was working. The evidence was emphatic that the plaintiff had never been apprised of the regulation requiring the use of flags or signals; that he had no knowledge that the company had provided rules, nor had any orders with reference to them been delivered to him or to his co-employees in the paint shop. It was held that the court properly refused to charge that if the plaintiff at the time of his injury was at work in an extra dangerous place and he knew it, and knew that no warning signals or flags were out, and he demanded none, then he assumed the risk of the danger and cannot recover, and that if defendant company had rules requiring men to use flags for such purposes, and plaintiff

¹ International & G. N. R. Co. v. See, also, Watson v. Railway Co.,
Hinzie, 82 Tex. 623, 18 S. W. 681. 58 Tex. 434.

² Missouri Pacific R. Co. v. Call- ³ Gulf, C. & S. F. R. Co. v. Finley
breath, 66 Tex. 568, 1 S. W. 622. (Tex.), 32 S. W. 51.

failed to use such flags or call for them, then he assumed the risk of his dangerous position and cannot recover. It was said that it was the duty of the defendant to establish regulations which would have advised its servants who were engaged in moving cars onto this track where plaintiff was at work of his position, and it should also have provided adequate means of warning him of the approach of danger. It cannot be said that such regulations are established until the company has caused them to be published or to be brought to the attention of the persons to be affected by them. They certainly cannot bind without promulgation;—a railroad company cannot avail itself of a rule which it has not properly published and which it has habitually neglected to enforce.¹

3324. Where coupling by hand was strictly prohibited, and employees were required to furnish themselves with a stick necessary for the purpose, by a rule of the defendant, and an employee who was not observing the rule when injured testified that he had no notice of the rule, and there was no evidence that he had, and the uncontradicted evidence was to the effect that the usual method of coupling cars by the employees of the company, in so far as the plaintiff knew, was by hand, with the knowledge and acquiescence of his superior, and without the suggestion of any other rule or practice, though it did appear that rules were printed on time-cards, and were given to the heads of departments and local agents to be distributed to the several employes under their charge, it was held that the employee was not bound by such rule, which as to him had not been properly published.²

D. Reasonableness and Sufficiency of.

3325. The question of the reasonableness of rules is purely a question of law to be determined by the court and never left to the jury. The reason and a sufficient one for thus

¹ International & G. N. R. Co. v. ²Fay v. Minneapolis & St. Louis
Hinzie, 82 Tex. 623, 18 S. W. 681. R. Co., 30 Minn. 231.

holding is that as a question of law certainty is attained. If it be submitted to juries, one may hold a rule to be reasonable, the next may hold the reverse.¹

3326. It was said, however, that whether a rule of a railroad company is or is not a reasonable rule is in many cases a question of law, but in the particular case it was held it could not be affirmed as matter of law that the special order there in question was reasonable, therefore it became a mixed question of law and fact for the jury.

The facts were that an employee on a gravel train, while the train was standing on the main track, was injured in a collision with an approaching train. Gravel trains, by rule, were prohibited from standing on the main track without permission. The superintendent by special order gave such permission, whereupon it became the duty of the conductor of the gravel train to send out a flag-man to notify approaching trains. This the conductor did, but the flag-man so negligently performed his duty that the warning was mistaken by the engineer of the freight train, and a collision was result. It was left to the jury to say whether such order was reasonable under the circumstances. *Wolsey v. Railway Co.*, 33 Ohio St. 227, was not referred to.²

3327. A rule forbidding employees to jump on switch-engines from the front when moving was held to be reasonable as matter of law.³

3328. The reasonableness of any rule for the government of servants in the course of their employment is a question of law. It was held to submit the question to the jury for

¹ *Wolsey v. Lake Shore & M. S. R. Co.*, 33 Ohio St. 227; *Vedder v. Fellows*, 20 N. Y. 126; *Illinois Central R. Co. v. Whittemore*, 43 Ill. 420; *Bass v. C. & N. W. R. Co.*, 36 Wis. 459; *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 5 So. 633; *Louisville, etc. R. Co. v. Fleming*, 14 Lea (Tenn.), 128; *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250; *Chilton v. St. L., I. M. & S. R. Co.*, 114 Mo. 88; *Avery v. Railway Co.*, 121 N. Y. 31; *St. L., I. M. & S. R. Co. v. Adcock*, 52 Ark. 406; *Hoffbauer v. D. & N. W. R. Co.*, 52 Iowa, 342.

² *Railway Co. v. Henderson*, 37 Ohio St. 549.

³ *Francis v. Kansas City, St. J. & C. B. R. Co.*, 110 Mo. 387, 19 S. W. 935.

determination under the circumstances was simply to leave the matter to their discretion, and was error. It was said: The necessity for holding this is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is left to juries, one rule would be applied to them to-day and another to-morrow. In one trial a railroad company would be held liable, and in another presenting the same question not liable. Neither the company or others would know their rights or their obligations.¹

3329. Where a rule was in question requiring that at a quarry, when obstructions were upon the track, flags should be displayed, it was held such rule was reasonable and sufficient, though whistling at the approach to such quarry was not required.²

3330. A rule of a railroad company forbidding employees going between cars in motion to uncouple them is reasonable and wholesome.³

3331. Rules of a railroad company that employees are to see that the machinery and tools are in proper condition, and if not to see that they are put so before using them, and that train-men handling cars are to see if they are safe to be handled, and not to handle them unless they are safe, are reasonable and proper.⁴

3332. An inquiry into the reasonableness of rules and regulations is proper as to those not in the service of a railroad company; as to those in such employ it is not proper. If a railroad company cannot have strict compliance with its orders from its servants, subordination and discipline would be at an end.⁵

¹ *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723; *St. L., I. M. & S. R. Co. v. Adcock*, 52 Ark. 406, 12 S. W. 874; *Railway Co. v. Whittemore*, 43 Ill. 420.

² *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723.

³ *Memphis & C. R. Co. v. Graham*, 94 Ala. 545, 10 So. 283.

⁴ *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360.

⁵ *Wolsey v. Lake Shore & M. S. R. Co.*, 33 Ohio St. 227.

3333. Where a passenger, though having an opportunity, neglected to purchase a ticket, it was held error to instruct the jury that the reasonableness of the regulation of the company making an additional charge in such cases was a question of fact for their determination. The regulation, however, was allowed by statute, and this may have been conclusive in determining that it was a matter of law.¹

3334. The reasonableness of a regulation requiring way passengers on a railroad to surrender their tickets before reaching the station nearest to that of their destination was held to be a question of law, and not one of fact for the jury. Reasons are given why such should be the rule, among which are the following: (1) That ordinarily jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. (2) A lack of uniformity; as what one jury might approve as judicious another might consider inconvenient.²

3335. Whether an order given by a conductor to an employee on the train relating to the safety of servants, or for the protection of the interests of the company, was reasonable, was held to be a question for the determination of the jury. The order in question was to the effect that the injured servant should not sit with his legs hanging over the sides of the car.³

3336. It was held that whether orders given by the superintendent to the conductors and engineers of colliding trains were ambiguous and conflicting was a question for the jury.⁴

3337. Whether or not the evidence is sufficient to show a case in which the duty to make rules rested upon the defendant is a question of law for the court. If the facts raise that issue it should be submitted to the jury, otherwise it should not. When submitted to the jury the reasonableness of such regulations is a question for the jury.⁵

¹ Hoffbauer v. D. & N. W. R. Co.,
52 Iowa, 342.

² Vedder v. Fellows, 20 N. Y. 126.

³ Prather v. Richmond & D. R.
Co., 80 Ga. 427, 9 S. E. 530.

⁴ Galveston, H. & S. A. R. Co. v.
Arispe, Adm'x, 5 Tex. App. 611, 23
S. W. 928.

⁵ Gulf, C. & S. F. R. Co. v. Finley
(Tex. App.), 32 S. W. 51; Texas &

3338. It was held that a rule of a railroad company requiring workmen engaged in repairing cars while on the main or side-tracks to put out a blue flag, which indicates they were at work making such repairs, did not apply to cars upon which such repairs were being made while in its shop or shop-yards.¹

3339. It was held that a rule as follows: "Coach switching—Conductors must see that brakemen with good and sufficient brakes are on any moving cars, and they are cautioned as to making flying switches (switch-rope being furnished). Avoid switching even if it increases your work," was advisory only, and imposes caution, but clearly does not forbid making flying switches.²

3340. A railroad company has the right to make reasonable rules for the conduct of its employees and also for the conduct of passengers. Whether any given rule be reasonable, and therefore within the power of the corporation, or whether it be unreasonable and therefore *ultra vires*, is a question of law for the court; but whether such rules are adequate for the safety of others and the management of trains is a question of fact for the jury.³

3341. Where a workman, while engaged in repairing a car on a side-track, was injured by another car being shoved against the one upon which he was at work, it was said: The real issue is as to whether or not the means provided by the company for protecting its employees engaged in repairing cars upon the repair tracks against danger arising from extreme causes, such as the use of these tracks for operating engines, were reasonably sufficient to afford protection; for, having placed its servants at labor upon these repair tracks, it was incumbent upon the company to use due care in protecting them from danger arising from ex-

N. O. R. Co. v. Echols, 87 Tex. 339, 27 S. W. 61; Pittsburg, C. & St. L. R. Co., 66 Iowa, 346.

R. Co. v. Lyon, 123 Pa. St. 140. ³ C., B. & Q. R. Co. v. McLallen,

¹ Quick v. Ind. & St. Louis R. Co., 84 Ill. 109, 130 Ill. 334, 22 N. E. 709.

treme causes. If the jury should determine from the evidence that the degree of care used by appellant in this regard was reasonably sufficient, then no recovery could be had against it for the injury. If otherwise, then recovery would follow.¹

3341a. It was held that a rule which merely stated, "Blue is a signal to be used by car-inspectors," was not sufficiently definite.²

3341b. A rule requiring conductors to look after switches when used by their engines was held sufficient, and the company not liable for the death of one conductor who was killed through the neglect of another, who had knowledge of the rule, to properly adjust a switch.³

E. Knowledge by Servant.

3342. Rules and regulations of the employer must be known to the employee before they will bind him.⁴

3342a. While it is the duty of employers to give notice to employees of the existence of rules, and so to promulgate them as to afford them reasonable opportunity of ascertaining their terms, yet, if the employee obtain knowledge in any manner of the existence and terms of such rules, he is equally bound to observe them. It is not essential that he shall either have a copy of the rules or have an opportunity to read them or hear them read; such is one of the means of promulgating rules, and probably the most effective, but it is not the only means by which, having received notice thereof, the employee will be bound.⁵

3343. Rules are not admissible in evidence where the evidence shows that the injured employee was never in possession of printed rules and had no knowledge of them.⁶

¹ *Railway Co. v. Watts*, 63 Tex. 552.

² *C., B. & Q. R. Co. v. McGraw* (Colo.), 45 Pac. 383.

³ *Davis v. Staten Island Rapid Transit R. Co.* (N. Y.), 1 App. Div. 173.

⁴ *L. E., St. L. & C. R. Co. v. Utz*, 133 Ind. 268; *Central Ry. & B. Co. v. Ryles*, 84 Ga. 420, 11 S. E. 499.

⁵ *Port Royal & W. C. R. Co. v. Davis*, 95 Ga. 292, 22 S. E. 833.

⁶ *Louisville, etc. R. Co. v. Berkey*, 136 Ind. 181.

3344. The adoption and promulgation by the employer of a rule for the guidance of the employee does not charge the latter with knowledge thereof, so as to impute negligence to him with respect to conduct in violation of it, but that to such end it is essential that knowledge of its existence and provisions must be brought home to him. This was said where a rule provided that brakemen should examine and ascertain the condition of coupling appliances before attempting to couple cars.¹

3345. An employee of a corporation, though obligated in writing by the terms of his employment to study the rules governing employees, carefully keep posted and obey orders, is not bound by rules of which he is ignorant and which have never been promulgated to him by the company.²

3346. It is the duty of employees to acquaint themselves with the rules and regulations of their employer and to obey them, and in case of injury to any such employee he will not be permitted to excuse himself by saying he did not know the rules, unless it appears he had not sufficient means of acquiring such information, and that his failure to know them was not from any want of care on his part.³

3347. The non-observance by an employee of rules of which it does not appear he had notice is not a violation of duty. This was said in reference to the act of a head brakeman in riding upon the engine, where the rules prohibited brakemen from being in the cars while in motion, and required them at such times to be at their post of duty. Copies of the rules were furnished to conductors and engineers, but not to brakemen. It had, however, been the custom for head brakemen to ride upon the engine, and this was known to officers and agents of the company. It was held that the question whether such brakeman, who was injured in a collision caused by defendant's negligence, was rightfully upon

¹ *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 241, 9 So. 271; *Louisville & N. R. Co. v. Perry*, 87 Ala. 392, 6 So. 40.

² *Carroll v. East Tenn., V. & G. R. Co.*, 82 Ga. 452, 10 S. E. 163.

³ *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250.

the engine at the time, and in being there was acting in the line of his duty, was properly submitted to the jury.¹

3348. Where a book of rules was kept in the conductor's desk in one of the cars, and plaintiff had seen it a great many times and knew it was in use, and the trainmen had access to it, and he had read the book or some portions of it, and knew that the duties of brakemen were printed in it, it was held that the plaintiff, who was a brakeman, was negligent in failing to obey the rules, though the railroad company had not furnished him with a book of rules nor required him to read it.²

3349. Where a rule prohibiting employees from going between moving cars has been in existence for a long period of time, and the plaintiff had been for several years in defendant's employ, and the rule was generally circulated among defendant's servants, and was posted in conspicuous places about depots and other places, it is admissible in evidence, though it is not shown that plaintiff had actual knowledge of it.³

3350. Where a rule is conspicuously posted in the cars upon a train upon which an employee frequently rides, he must be presumed to have knowledge of such rule.⁴

3351. A section-hand was directed to walk back and forth between two points on defendant's track. While doing so he mounted a passing engine, which defendant's rules forbade. These rules had been in force for several years; although they had not been formally promulgated by the receiver after his appointment, they were printed, and copies of them had been formally furnished to section-foremen, the one over the deceased included. The deceased had been in the employ of the company as a section-hand for many months prior to the accident, and the presumption is that he was acquainted with the rule. At all events, the fair in-

¹ *Sprong v. Boston & Albany R. Co.*, 58 N. Y. 56.

² *Lacroy v. N. Y., L. E. & W. R. Co.*, 132 N. Y. 570.

³ *Alcorn v. C. & A. R. Co.*, 108 Mo. 81, 16 S. W. 229.

⁴ *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21.

ference from the record is that he had a reasonable opportunity to become acquainted with it, which, for the purposes of the present case, is equivalent to actual knowledge.¹

3352. Where bulletins were properly posted requiring trains to be kept under complete control at designated points where contractors were at work, at one or more places where it was the engineer's duty under the rules of the company to have seen and read them, it was held that this was equivalent to actual notice, though the engineer injured testified he did not remember seeing the bulletin notices.²

3353. Where a rule was copied into an order book where all special instructions were kept, and such book was kept in the office of the train-master, where the trainmen and yardmen had access to it, and was also posted in the round-house, machine shops, and in the middle yard in the yard-master's office there, and the business of the yardmen and switchmen called them into that office every day more or less, it was held that it could not be said as matter of law, as charged by the trial court, that a switchman was charged with constructive knowledge, in the absence of evidence as to the length of time such switchman had been there employed, and that such posting existed during the time of his employment, but that under the circumstances the question of his knowledge was for the jury.³

3354. Where a brakeman was injured in attempting to couple cars by hand, which injury would not have happened had he used a stick as required by the rules, and it appeared he had acted as brakeman for two months, had seen coupling done both ways, but testified he did not know of the existence of the rule, and it also appeared that sticks adapted for such use were kept on the train, it was held that whether

¹ Shenandoah Valley R. Co. v. folk & W. R. Co. v. Williams, 89 Lucado's Adm'x, 86 Va. 390, 10 Va. 165. S. E. 422.

³ Francis v. Kansas City, St. J. &

² Williams v. Norfolk & W. R. C. B. R. Co., 110 Mass. 387, 19 S. W. Co., 89 Va. 165, 15 S. E. 522; Nor- 935.

he was chargeable with knowledge was a proper question for the jury.¹

3355. As tending to show knowledge on the part of a brakeman of the existence and terms of a rule requiring couplings to be made with the use of a stick, it was held competent to show that he had seen others use the stick in coupling, but it is not competent to show that other employees frequently referred to the rules in discharging their duties.²

3356. Although two rules in a book containing five hundred rules required the constant presence of brakemen at the brakes on top of a train, a brakeman who, in accordance with usage and with the conductor's sanction, remains in the caboose a part of the time during inclement weather, and who was injured while ascending to his post of duty in obedience to an order of the conductor, was held not to be negligent, where there was no evidence that he was ever required to learn such rules or did in fact know of them.³

3357. Where a brakeman was injured through the negligence of an engineer, while attempting to couple cars by hand while they were in motion, and he testified that he knew that it was against the rules to undertake to perform such act without the use of a stick, and nothing appeared to show any necessity to couple or uncouple them at the time, it was held a verdict should be directed for the defendant, though the particular rule may never have been read to the plaintiff and he may have been ignorant of it.⁴

3358. Where an inexperienced workman was assisting a car-repairer in repairing a car upon a track, and he was injured by other cars being shoved upon him, and it appeared the rules required that hand-brakes should be set on passenger coaches or the wheels blocked; that reliance should not

¹ Propst v. Georgia Pacific R. Co., 83 Ala. 518, 3 So. 764; Georgia Pacific R. Co. v. Propst, 83 Ala. 518.

³ Georgia Pacific R. Co. v. Davis, 92 Ala. 300, 9 So. 252.

² Memphis & Charleston R. Co. v. Askew, 90 Ala. 5, 7 So. 823.

⁴ Richmond & D. R. Co. v. Thomson, 99 Ala. 471, 12 So. 273.

be placed on the air-brakes; that the plaintiff had not been furnished with a copy of such rules, though he had asked for them three separate times, and he did not know of the one in question or of the latent danger from reliance upon the air-brakes, it was held that, under these conditions, contributory negligence on the part of the plaintiff did not appear.¹

3359. It will be presumed, in the absence of proof to the contrary, that a master has notified a servant of the rules by which such employee was to be governed.²

3360. Knowledge by a section-foreman of the existence of rules for running of extra trains without giving signals is an assumption of the risk.³

3361. Where the evidence shows an injury to a servant to have occurred through his violation of an established rule of the master, the burden is upon the servant to show that he had no actual knowledge of the rule, and that its existence had been so concealed or defectively published that he could not by the exercise of ordinary care have acquired such knowledge; and where a servant had in writing acknowledged reading the rule, it was error to submit the question of his knowledge to the jury, but knowledge on his part should be assumed by the court.⁴

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F. *Enforcement and Waiver of.*

3362. A railroad company does not discharge its whole duty to the public and its servants by merely framing and publishing proper rules for the conduct of its business and the guidance and control of its servants, but is also required to exercise such a supervision over its servants and the prosecution of its business as to have reason to believe it is being conducted in pursuance of such rules.⁵

¹ *Gulf, C. & S. F. R. Co. v. Kiziah*, 4 Tex. App. 356, 22 S. W. 110.

⁴ *Texas & Pacific R. Co. v. Moore* (Tex.), 27 S. W. 926.

² *Pilkinton v. Gulf, C. & S. F. R. Co.*, 70 Tex. 226, 7 S. W. 805.

⁵ *Whittaker v. D. & H. C. Co.*, 126 N. Y. 544. See, also, *Chapman*

³ *Jolly v. Detroit, L. & N. R. Co.*, 93 Mich. 370.

v. Erie R. Co., 55 N. Y. 579; *Baulec v. N. Y. & H. R. Co.*, 59 N. Y. 356;

3362a. It is the duty of the master, where the business requires the establishment of rules, to see that they are enforced, and a waiver of such as have been habitually violated with his knowledge or acquiescence will be inferred.¹

3362b. The following instruction was held to correctly state the law: "If you find there was a rule prohibiting brakemen from uncoupling cars while in motion, or if there was a rule requiring brakemen before taking charge of a train to inspect the coupling appliances of the cars, and such rules were brought to plaintiff's notice . . . and he neglected to comply with either of said rules, and such neglect was the cause of the injury, then plaintiff cannot recover unless you find . . . that the brakemen habitually disregarded them with the acquiescence and knowledge of the defendant." ²

3363. A brakeman injured while uncoupling a car without the use of a stick, in violation of a rule, cannot recover even though he acted in obedience to the order of the conductor, a person having a right to control and direct his services. A conductor has no authority to dispense with a rule made for the safety of employees.³

3363a. Where the violation of a rule requiring the use of sticks in coupling cars was sought to be excused on the ground that the act was not objected to by the conductor of the train, knowing it was to be done, it was held that the act could not thus be excused. It was said it would be a strange rule of law which would justify the negligence of an employee in the performance of his duties by simply showing that another employee engaged about the same business was likewise negligent.⁴

3364. A person in charge of a train cannot waive a rule well known to a brakeman absolutely prohibiting brakemen

Wabash R. Co. v. McDaniels, 107 71 Miss. 987, 15 So. 133. *Contra*,
U. S. 452. Mason v. Richmond & D. R. Co.,

¹ Louisville & N. R. Co. v. Reagan 111 N. C. 482, 19 S. E. 362; Rich-
(Tenn.), 33 S. W. 1050. mond & D. R. Co. v. Rudd, 88 Va.

² Louisville & N. R. Co. v. Reagan 648, 13 S. E. 361.
(Tenn.), 33 S. W. 1050. ⁴ Port Royal & W. C. R. Co. v.

³ Richmond & D. R. Co. v. Rush, Davis, 95 Ga. 292, 22 S. E. 833.

from coupling and uncoupling cars except with a stick, by ordering such brakemen to go between cars and place in position by hand a bent coupling, which could not be controlled by sticks; and where a brakeman complied with such a direction it was held that in so doing he was in the performance of an act outside the scope of his employment and assumed the risk.¹

3365. Where a brakeman, when injured, was riding in the cab of the engine while the train was descending a grade, at the direction of the conductor, because it was extremely cold, and the rules provided that the conductors should require all their brakemen to be on top of the train while ascending or descending grades, it was held that the conductor had authority in the premises, and such brakeman was not guilty of contributory negligence.²

3366. A train-dispatcher so far represents the company that, in an emergency, his verbal order to an employee will justify the latter in obeying it, though a general printed rule requires that such specific order should be in writing. This was held where a conductor was verbally directed by the train-dispatcher to take the engine attached to his train and go after a caboose which had become detached from the train and left some miles behind, and with the consent of the engineer and fireman he obeyed, and in returning, his engine came in collision with a train, whereby the fireman was killed. The rule in question provided that "All orders and messages relating to the movement of trains must be in writing, in full, and no abbreviations used, except" certain ones stated.³

3367. Evidence that employees of a railroad company were accustomed to act in violation of a rule is not admissible to establish a waiver of the rule, unless it be shown that a knowledge of the custom was known to the officers charged with the enforcement of the rule. The court did not decide

¹ *Richmond & D. R. Co. v. Finley*,
63 Fed. 228 (C. C. A.), reversing
Same Case, 59 Fed. 420.

² *Hurlburt v. Wabash R. Co. (Mo.)*,
31 S. W. 1051.

³ *Smith v. Wabash, St. L. & P. R.*
Co., 92 Mo. 359, 4 S. W. 129.

whether the rule could be waived by any less formal or authoritative action than that by which it was adopted. The facts were that a brakeman left his post of duty and was riding upon the engine, and it was sought to show that such was customary.¹

3368. The mere knowledge by the conductor of a train of the violation by a brakeman on the train of a rule of the company requiring him to be on top of cars in order to give signals to the engineer does not exonerate the brakeman from the charge of contributory negligence for injuries received by him in consequence of his violation of such rules. It was said: If the rule were otherwise, then the supineness and negligence of a superintending officer of the corporation would relieve a subordinate from responsibility for his own conduct; in other words, the wrong of one employee is excused by a like wrong of another.²

3369. Where it appeared there was an established usage on the part of engineers, known and acquiesced in by the superior officers, to allow firemen to make short moves when the engineer was not on the engine but near enough to give directions, it was held that the engineer, under the particular circumstances of the particular case, should not be held guilty of contributory negligence for violating a rule not to permit firemen to operate an engine when the engineer was not upon it. Knowledge of such usage need not be shown by direct evidence that the officers saw it practiced, but it may be inferred from circumstances — as from its notoriety, long standing, and that it was known to the company's employees. The facts were that an engineer was killed by being run over by a hand-car in charge of section-men while standing on the main track giving directions to his fireman to pull the train ahead on the side-track.³

3370. Where the rules promulgated by a railroad company prohibited engineers from permitting their engines

¹ O'Neill v. Keokuk, etc. R. Co.,
45 Iowa, 546.

³ Barry v. Hannibal & St. J. R.
Co., 98 Mo. 62.

² Atchison, T. & S. F. R. Co. v.
Reeseman, 60 Fed. 371 (C. C. A.).

to be placed in charge of or operated by firemen, and it appeared that engineers frequently violated this rule, which was known to the master mechanic, it was held that the company was guilty of negligence in permitting its rules to be violated and in retaining in its employ such engineers, the court assuming that because they violated a rule of the company with its apparent assent it was conclusive evidence that they were incompetent.¹

3371. The mere disregard by an employee of a railroad company of a rule relating to the coupling of cars, when with knowledge and acquiescence of the division superintendent such employee and others have constantly and without exception disregarded it, was held to be sufficient to justify a finding that the company had waived a compliance with the rule, even though it appeared that the employee had signed a paper which set out the rule which contained a notice that all the rules of the company would be violated at the risk of the employee, and that all such violations, whether habitual or otherwise, were not assented to or acquiesced in by the company.²

3372. Where a rule has been habitually disregarded by employees, and officers of the company had witnessed its violation, the question whether the officers had knowledge of and had approved its disregard becomes one for the jury.³

3372a. An engineer, eight days prior to the accident which caused his injuries, acknowledged in writing the receipt of a book of rules in which was included a rule requiring engineers to keep their train under control when approaching a certain station. It was claimed that it had been the custom among engineers to disregard such rule and therefore the company had waived the same. It was held that the fact that such custom prevailed prior to the engineer receipting for the rules was insufficient to show a waiver of observance of the rule by the engineer at the time of the accident.⁴

¹ *Ohio & Mississippi R. Co. v. Collarn*, 73 Ind. 261.

² *Northern Pac. R. Co. v. Nickels*, 50 Fed. 718 (C. C. A.).

³ *White v. Louisville, N. O. & T. R. Co.*, 72 Miss. 12, 16 So. 248.

⁴ *Louisville & N. R. Co. v. Mother-shed* (Ala.), 20 So. 67.

3372b. In order to claim a waiver of a known rule by an employee on the ground that the rule had been habitually disregarded and relieve him from the imputation of contributory negligence in failing to observe it, he must show that knowledge of such non-observance by the employees was brought home to the master.¹

3372c. Knowledge on the part of the master of the habitual disregard of a rule directing brakemen not to uncouple cars while in motion may be imputed when the custom has existed for a considerable length of time, and a waiver of its enforcement inferred, though the employees who disregard it have knowledge of the rule and appreciate the dangers incident to the act.²

3373. Where a brakeman, under the direction of the conductor of his train and in the presence and with the knowledge of the superintendent of that division of the road, opens and adjusts a switch for a long time in a manner different from that prescribed by the established rules, such rules are deemed to be changed or modified as to such brakeman.³

3374. Where an engineer placed his engine upon the main track of the road contrary to its prescribed rules, and it appeared the rule had been habitually violated by engineers for a period of at least one year, it was held that the question of defendant's negligence in not enforcing its rule was for the jury, and a finding by them of negligence was warranted.⁴

3375. Though a rule in terms prohibited employees from going between moving cars to couple or uncouple them, it was held competent to show what was usually and habitually done in this respect while operating trains, because if a company permitted a course of conduct inconsistent with its rules it ought not to be allowed to hold its employees to the very letter of its rules to shield itself from liability for what it has permitted.⁵

¹ Alabama G. S. R. Co. v. Roach (Ala.), 20 So. 132.

² Fish v. Illinois Central R. Co. (Iowa), 65 N. W. 935.

³ Kansas City, F. S. & G. R. Co. v. Kier, 41 Kan. 661, 21 Pac. 770.

⁴ Whittaker v. D. & H. C. Co., 126 N. Y. 544.

⁵ Eastman v. L. S. & M. S. R. Co., 101 Mich. 597, 60 N. W. 309.

3376. Yet it was held that the act of an employee in going into a dangerous place contrary to the rules of his employer would not be excused because it was customary for other employees to go into the same place. This was held where a brakeman was injured while riding on the brake-beam of the tender.¹

3377. It makes no difference that other employees frequently or customarily disregarded a rule, unless the company, with knowledge of their practice, acquiesced in it in a way to sanction it or practically to abrogate the rule; nothing less would relieve the servant from abiding by his uniform orders. This was said where a brakeman was injured while coupling cars by hand where the rules provided that he should use a stick.²

3378. Since a rule forbidding employees from going between cars in motion to uncouple them is clear and explicit, evidence that for many years it has been the custom of brakemen to go between the cars and make uncouplings while they are in motion is inadmissible to show that the rule, not having been insisted upon, is not binding on an employee injured by its non-observance.³

3378a. Evidence that it was the custom generally on the defendant's road among employees to uncouple cars while in motion, and that the officers of the company knew of such custom and had made no objection to it, is competent to prove a waiver of the observance of a rule prohibiting going between the cars while in motion to uncouple them.⁴

3379. A switchman who is injured while violating a positive rule which forbids jumping on switch-engines while they are in motion, by standing in the middle of the track and stepping onto the foot-board, cannot recover against the company. Such rule is not to be deemed abrogated by

¹Benage v. L. S. & M. S. R. Co., 12 S. E. 882; Norfolk & W. R. Co. 102 Mich. 79, 60 N. W. 286. v. Briggs (Va.), 14 S. E. 753.

²Sloan v. Georgia Pacific R. Co., 86 Ga. 15, 12 S. E. 179; Rome & C. 94 Ala. 545, 10 So. 283.

Const. Co. v. Dempsey, 86 Ga. 499, ⁴Spaulding v. C., St. P. & K. C. R. Co. (Iowa), 67 N. W. 227.

the fact that employees violated it at will, where the evidence showed that it was enforced by the company, and the rule itself recited that yardmen were in the habit of jumping on engines in the manner thus prohibited, and that its express purpose was to put an end to the practice.¹

3380. Upon a subsequent appeal it was held that whether such switchman was guilty of contributory negligence was a question for the jury, where it appeared that the rule was habitually violated with the knowledge of the company and that such switchman was ignorant of the existence of the rule.²

3381. The abrogation of a rule may be presumed where it is frequently and openly violated for such a length of time as that the company could by the use of ordinary care have ascertained its non-observance. Where a rule is not observed by employees for a long length of time and no attempt is made by the company to enforce it, it becomes of no force or effect, and the mere fact of non-observance thereof will not be considered negligence in case of injury. This was held where an engineer, in violation of a rule as to keeping his train under control between certain points, was injured by running into a tender which was partly on the main track, and there was evidence that the rule had not been respected for six months.³

3381a. The supreme court having under consideration the rule requiring east-bound trains to come to a stop some distance from the station near the siding and to be held under control while approaching it, and further requiring all trains to look out for the signal-board at the station, it appearing that there was no signal-board at night, that the rule was made to prevent collisions with work trains, and that such trains did not work at night, and that among employees it was generally understood that the rule had no application

¹ Francis v. Kansas City, St. J. & C. B. R. Co., 127 Mo. 658, 28 S. W. C. B. R. Co., 110 Mo. 387, 19 S. W. 842; affirmed, 30 S. W. 129 (Mo.) 935.

³ Texas & Pacific R. Co. v. Leighty

² Francis v. Kansas City, St. J. & et al. (Tex. App.), 32 S. W. 799.

to night trains, it was held that reasonably the engineer could so construe the rule.¹

The court do not pass upon the first of the propositions stated in 3381, by the court of appeals, saying the question was not raised, but hold that under the evidence the rule was susceptible of two constructions — one that it was not to be observed at night, as work trains were not then employed, and such rule was established on account of work being done at such places, and that the deceased was not as matter of law to be held guilty of contributory negligence in adopting the former construction.²

3383. Evidence as to its being the custom for switchmen, upon finding it impossible to couple with a stick, to go between the cars for that purpose, having first signaled the engineer to stop, is admissible to show that defendant did not, under all circumstances, insist upon employees coupling with a stick.³

3384. Where the plaintiff entered into an express stipulation to abide by a rule prohibiting brakemen from going between cars to couple them, evidence is inadmissible to show that there was a custom on the defendant's road for brakemen, when they found it impossible to make a coupling with a stick from the outside, to go in between the cars for that purpose, after having first signaled the engineer to stop the train.⁴

3385. A verbal order to the effect that hostlers should not move switch-engines being proved, evidence is admissible to show that they were in the habit of doing so, as bearing upon the question of the company's acquiescence in their breach of the rule.⁵

¹ *Texas & Pacific R. Co. v. Leighty*, 88 Tex. 604, 32 S. W. 515. 68, 8 So. 249. See 97 Ala. 187, 13 So. 209, where the doctrine of the former case is modified.

² *Texas & Pacific R. Co. v. Leighty et al.*, 88 Tex. 604, 32 S. W. 515. ⁴ *Richmond & D. R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209.

³ *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514, 8 So. 776; *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. 249. ⁵ *Louisville & N. R. Co. v. Richardson*, 100 Ala. 232, 14 So. 209.

3386. It was held that the orders of a superior, inconsistent with printed rules for the government of engineers, relating to the operation of their train, may be obeyed by them, and they will not thus be subject to be charged with contributory negligence in obeying such orders.¹

3387. Where the rear brakeman upon a train was injured while ascending the ladder of the caboose or rear car at a call for brakes by contact with a projecting shed, and it appeared that a rule in force, among other things, stated that the post of the rear brakeman is on the last car of the train, which he must not leave except to protect the train, and another rule prohibited them from leaving their brakes while the train was in motion, nor take any other position on the train than that assigned them by the conductor, and it was attempted to be shown that it was customary for the rear brakeman to ride inside the rear car, it was held that it was proper to exclude such evidence. It was said there does not appear to be any ambiguity in the terms of these rules, such as would justify the admissibility of extrinsic evidence to show to what state of case they are applicable or how they should be applied. They are intended as a means to be enforced for the protection of the train, the public and all those engaged in conducting the movement of the train, and therefore no lax or variable construction of such rules should be allowed. The plaintiff, when he entered the service of the defendant and accepted the book of rules prescribing his duties and the manner of performing them, obligated himself to observe and conform to such rules according to the plain terms thereof, and not according to what may have been a customary practice among other employees regardless of the express requirements of the rules.²

3388. A conductor who without protest, while another train is overdue and expected from the opposite direction, starts out with his train in violation of the rules of his company, with which he is familiar, shows want of due care which

¹ *Pennsylvania Co. v. Roney*, 89 Ind. 453.

² *Gordy v. New York, P. & N. R. Co.*, 75 Md. 297, 23 Atl. 607.

will preclude his recovery for injuries to himself in a collision, though he may be acting under the negligent orders of his superior officer, whom he is bound to obey or lose his position.¹

3389. The contention on the part of the plaintiff, an engineer in the employ of the defendant, was, among other things, that he was injured by reason of the neglect of the company to maintain a proper signal light at the crossing. It appeared that he received signals to go ahead with his train. That there was a switch-lamp which worked automatically displaying a green or blue light when the switch was properly closed, and a red light when the switch was open. That on the night in question the lamp was out. That a rule of the company, with which the plaintiff was familiar, stated that "a signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal and the fact reported to the master of transportation." The defendants relied upon this rule and contended that its violation by the engineer was such negligence as would prevent a recovery. There was evidence tending to show that it was a common, every-night occurrence to find this light extinguished, and this was true of signal lights along the line, and that the plaintiff was accustomed to run in disregard of such lights, and that such was the custom. The evidence, however, was conflicting as to the failure to display lights and the custom of others running in disregard of them. Knowledge of such custom was denied by the defendants. It was held proper to refuse an instruction in regard to the violation of the rule that omitted all reference to the question of the company's acquiescence therein.²

3390. It was said in reference to a rule as follows: "Conductors, brakemen and switchmen, in coupling or uncoupling cars, must not assume that signals given to the engineer or fireman will be obeyed. When obedience to a signal thus

¹ Wescott v. New York & N. E. R. Co., 153 Mass. 460, 27 N. E. 10. ² C. & W. I. R. Co. v. Flynn, 154 Ill. 448, 40 N. E. 332.

given by a conductor, brakeman or switchman to an engineer or fireman is essential to the safety of the conductor, brakeman or switchman in the performance of a duty, he must know that the signal has been understood and is obeyed before he places himself in a position of danger relying upon such obedience. When he acts without such knowledge he assumes all risks of the danger arising from such misunderstanding or disobedience of signals," — that the evidence shows that this rule was disobeyed and that it was the general practice of the employees to disregard it; that it was so disregarded in the presence of the company's officers at Marshalltown. It matters not how or when the knowledge of such disobedience comes to the officers of the defendant. Indeed, we have held that it must not appear that the officers of the defendant who are charged with the enforcement of the rules had actual knowledge of the custom of the defendant's employees as to violating the rules; such notoriety or knowledge may be inferred from the circumstances; it may be implied from the notoriety of the custom, whereby they are chargeable with notice (citing *Lowe v. Railway Co.*, 89 Iowa, 328; *Horan v. Railway Co.*, 89 Iowa, 420). Furthermore, the evidence is undisputed that the employees of the road could not obey this rule and do the work incident to their positions. Such being the case, it would seem that the rule must have been enacted to serve some purpose other than the protection of the property of the defendant or the proper conduct of its business or the safety or protection of its employees. A rule which if obeyed would prevent the defendant from properly carrying on its business does not commend itself to the court as being made in good faith and in performance of any legitimate purpose.¹

3391. It was held that a rule prohibiting the coupling and uncoupling of cars while in motion is reasonable, and if enforced is calculated to protect the limbs and lives of those whose duty it is to perform the always dangerous work of coupling or uncoupling cars. That it was competent for the

¹ *Strong v. Iowa Central R. Co.* (Iowa), 62 N. W. 799.

parties to waive any part of it. That such waiver may come from constant violation of the rule acquiesced in by the defendant company. That such a usage or custom may be shown when the defendant has through its proper officers knowledge of its violation and their conduct shows acquiescence in such violation. That actual knowledge of such custom on the part of the officers of the defendant who are charged with the enforcement of its rules need not appear. That such notice or knowledge may be inferred from circumstances—it may be implied from the notoriety of the custom.¹

G. Failure to Observe by Servant Injured.

3392. An employer may adopt reasonable rules for the government of his employees, and when brought to the knowledge of the latter, who thereafter continue in the master's service, the rules, and an implied undertaking to obey them, enter into the contract of service. Where a rule of a railroad company requires that cars shall be coupled by the use of coupling sticks, and this rule is brought to the knowledge of one employed as brakeman and assented to by him, it constitutes a part of his contract of service, and for injury received by him in endeavoring to make a coupling by hand the company is not liable, unless it be shown that the act could not safely have been performed even by the use of the appliance provided, or that obedience to the rule was not practicable under the circumstances of the particular case.²

3393. The bare fact that a position into which an employee is ordered for the discharge of his duty is a dangerous one will not justify his disobedience, since he was employed for that purpose, and its discharge may be necessary to save the lives of others. And a failure to do his duty or disobedience under such circumstances might be negligence on his part,

¹ *Lowe v. Chicago, St. P., M. & O. R. Co.*, 89 Iowa, 420, 56 N. W. 519. See *Union Pacific R. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774. ² *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Cincinnati, I., St. L. etc. R. Co. v. Lang*, 118 Ind. 579.

rendering the employer liable to others injured thereby. To assume a position of danger is not necessarily negligence, but is often a clear duty, and an employee in such case, even if injured, would have no right of action, since he was employed for such position of danger and paid for assuming it. This was said where one of a section crew was injured in the attempt to move a hand-car from the track in front of an approaching train, acting under the orders of the section foreman.¹

3394. Where a brakeman, in violation of a rule which required him, when approaching a station, to be on the top of the train to attend to the brakes, was injured while riding in the cab of the engine near a station at the intersection of a side-track, caused by the derailment of the train, it was held that as matter of law he was guilty of contributory negligence and should have been nonsuited.²

3395. Where there was a rule which provided that "brakemen and switchmen, in coupling or uncoupling cars, must not assume that signals given to the engineer or firemen will be obeyed, when obedience to a signal thus given is essential to the safety of the brakeman or switchman in the performance of a duty, and that he must know that the signal is understood and obeyed before he places himself in danger relying upon such obedience, and that when he acts without such knowledge he assumes all risk of danger arising from misunderstanding or disobedience of signals," and it appeared that a brakeman, without knowing that his signal to the engineer was understood, went between a car and a moving train to make a coupling and was injured, it was held that his acting in violation of the rule would prevent a recovery.³

3396. Where an employee was injured while cleaning a machine in motion, in violation of a rule of the company

¹ *Frandsen v. C., R. I. & P. R. Co.*,
36 Iowa, 372.

³ *Deeds v. C., R. I. & P. R. Co.*, 74
Iowa, 154.

² *Conners v. Burlington, C. R. &
N. R. Co.*, 74 Iowa, 383.

which forbade such an act, it was held that such was contributory negligence on her part which would prevent a recovery.¹

3397. Where an employee upon a train was required by the rules to take the place of the rear brakeman when the latter was required to flag a train, without waiting for specific orders, and he failed to do so, being asleep at the time, and was injured by a collision, it was held that his own failure to comply with the duties required of him by the train rules directly contributed to his injury, which prevented a recovery.²

3398. Where the rules provided that a signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal, and it was claimed by an engineer who was injured in collision with cars which had been blown from a side upon the main track that the signal could not be seen on account of the fog, it was held that his negligence was the same whether he could or could not have seen it; that he ought to have remembered the rule and acted accordingly.³

3398a. It was said in reference to a rule which required an engineer to keep his train under control on approaching stations, that the rule was just and reasonable. Being promulgated, and no unforeseen emergencies arising which would render obedience to it in a given case impracticable or disastrous, all discretion as to the necessity of obedience was exhausted. The rule was mandatory upon the engineer. He had no right to inquire whether the surroundings seemed to render obedience necessary. It was of no moment, therefore, whether his disobedience was expressly wilful or inadvertent, or resulted from a reasonable belief in his mind that in a given instance obedience was unnecessary.⁴

3399. Where the conductor of a freight train, contrary to the rules of the company, allowed cars to be shifted and run

¹ *Shanny v. Androscoggin Mills*, 66 Me. 420.

³ *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

² *Eastburn v. Norfolk & W. R. Co.*, 34 W. Va. 681, 12 S. E. 819.

⁴ *Louisville & N. R. Co. v. Mother-shed (Ala.)*, 20 So. 67.

down grade without an engine attached, and thereafter, while he was between such cars, a brakeman without objection from such conductor caused another car to be run down the same way, which by reason of defective brakes could not be controlled, and struck the first car so run down, causing injury to such conductor, it was held that the conductor could not recover; that his violation of the rule was the cause of his injury.¹

3400. While a conductor of a train should be held to a reasonable observation of rules, still he has a general duty and discretion to use his judgment for the safety of his train in case of an emergency. Hence it was held, where a conductor whose place of duty under the rules at the time of the accident was on the cars, about the middle of the train, but anticipating an obstruction he went to the engineer to put him on his guard, and was injured while absent from his post, that he was not guilty of a violation of the rule.²

3401. An engineer who had received orders to pass a certain train at a designated place, supposing a train he met at such point, and being so informed by another employee, was the train referred to in the order, proceeded with his train and collided with the train referred to in the order. There was a positive order, to which his attention had recently been called, to the effect that he must know that the train met is the one specified in the order. It was held that his violation of the rule was not excused, and therefore he could not recover.³

3401a. A rule required that trains should pass the place of the accident under full control; another rule required the side-tracking of a train which at the time stood on the main track. The head-light upon the latter train had gone out and a lantern was substituted. A train approached within two hundred feet of the latter before discovering it, and was running about seven miles per hour, such discovery being

¹ *Richmond & D. R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274.

² *Somerset, etc. R. Co. v. Galbraith*, 109 Pa. St. 32.

³ *Fritz v. Missouri, K. & T. R. Co.* (Tex. App.), 30 S. W. 85.

too late to avoid a collision. It was held that the accident was caused by a failure to observe rules, not by a failure to establish rules.¹

3402. Where a conductor was injured by reason of the violation of a rule which required engineers to "slow up" before reaching a switch, and also required the conductor to signal the engineer for such purpose, which he failed to do, it was held his violation of the rule would prevent a recovery.²

3403. Where an employee of a railroad company was sent on a wrecking train to assist in removing the debris of a wrecked train from the track, and, instead of taking his seat in the car, he, in violation of a published rule of long standing, entered the locomotive and took a seat with the fireman just in front of the latter, where he remained until a collision took place with a freight train and he was killed, it was held that he was guilty of such negligence in taking an extrahazardous place as to bar any right of action by his personal representative, notwithstanding the negligence of the servant in charge of the train.³

3404. A brakeman in the defendant's employ was killed in a collision between his train and a section of another upon the main track. It appeared that such latter train was composed of several sections, and that the last section but one displayed the proper signals, which the train-hands on the train upon which the deceased was employed failed to observe, and the conductor thereof, evidently presuming that the track was clear, ordered the train from the siding, and had proceeded but a short distance when the collision occurred between his train and the last section of the other train. Several rules were in evidence, among others one which provided that all signals must be strictly in accordance with the rules, and train-men and engine-men must

¹ *Simpson v. Central Vt. R. Co.*, 5 App. Div. 614. N. Y.).

³ *Abend v. T. H. & I. R. Co.*, 111 Ill. 202.

² *Louisville & N. R. Co. v. Moth-ershed*, 97 Ala. 261, 12 So. 714.

keep a constant lookout for signals. It was held that the result was occasioned by the violation of this rule, and that it would be paying a premium on negligence to permit a recovery in such a case. That the question as to whether the conductor represented the master, and was also negligent, was immaterial, — the duty was imposed upon all alike.¹

3404a. Where the rules required that employees should be on the top of cars, and one such was injured, while standing on the ladder at the side of the car, by contact with a coal-chute located close to the track, it was held he could not recover.²

3404b. The violation of a rule prohibiting the drinking of intoxicating liquors will not be a defense in an action for injuries by an employee where it did not contribute in any appreciable degree to his injury.³

1. Prohibiting Going Between Cars.

3405. It was held that a brakeman who was injured while violating a known rule of the company prohibiting him from going between the cars while in motion to uncouple them could not recover of the company for such injury, in the absence of all evidence showing that the company knowingly permitted the violation of its rule.⁴

3406. Where a brakeman was injured by being thrown from a moving train while uncoupling the engine and tender, and it appeared he was not required to attend to such uncoupling while the train was in motion, but that the rules of the company forbade the attempt, it was held there was such evidence of contributory negligence as to justify a compulsory nonsuit.⁵

3407. Where a rule declared that "entering between cars while in motion to uncouple them, and all such imprudences,

¹ Ward's Adm'r v. Chesapeake & Ohio R. Co., 39 W. Va. 46, 19 S. E. 389.

³ Western & A. R. Co. v. Bussey, 95 Ga. 584, 23 S. E. 207.

² Central Trust Co. v. East Tenn. V. & G. R. Co., 69 Fed. 353.

⁴ Schaub v. H. & St. J. R. Co., 106 Mo. 74.

⁵ Lockwood v. C. & N. W. R. Co., 55 Wis. 50.

are dangerous and in violation of the rules of the company," it was held that an employee who attempted to uncouple moving cars and was injured by reason of the draw-head being forced back, owing to a defect, could not recover, upon the ground of his violation of the rule.¹

3408. Where a rule of a railroad company forbids a brakeman to go between the cars in making a coupling, the facts that the conductor in charge tells a brakeman to hurry up, and that the conductor in charge has previously seen him go between the cars to make couplings, do not amount to an express order to go between the cars so as to relieve the brakeman from an imputation of negligence in so doing.

The evidence was substantially different on a former appeal (111 N. C. 482, 16 S. E. 698), as there it appeared the conductor had told him, when he could not couple with a stick, to go in and couple with his hands. It now appears that such direction was, by a former conductor, made several months earlier. Such direction does not justify the brakeman in doing so under the circumstances.²

3409. Where a brakeman attempted to couple the engine, attached to a rear section of a train, to the caboose of the freight section, while both sections were moving, and was injured by slipping from the pilot of the engine upon which he was standing, and the rules forbade coupling cars while in motion, it was held he could not recover, even though he attempted the act at the direction of the engineer.³

3409a. Rules which prohibit employees from going between moving cars to uncouple them are reasonable and should be enforced; yet emergencies may arise which require prompt action on the part of employees, and which cannot be successfully met without a violation of the rule. In such case the employee is relieved from compliance with the rule; but this will not have the effect to shield him from

¹ Johnson v. Chesapeake & O. R. Co., 36 W. Va. 73, 18 S. E. 573; Darracott v. Chesapeake & O. R. Co., 83 Va. 288, 2 S. E. 511.

² Mason v. Richmond & D. R. Co., 114 N. C. 718, 19 S. E. 362.

³ East Tenn., V. & G. R. Co. v. Smith, 89 Tenn. 114, 14 S. W. 1077.

his own culpable negligence. A mere question of convenience or of saving time, no other pressing interest being involved, will not justify disregard of the rule.¹

3410. Where it was not a brakeman's duty to get down on the side of the car to uncouple the cars while the train was moving, and there was a strict rule prohibiting uncouplings to be made on moving trains, it was held there could be no recovery for the death of a brakeman caused by his being brushed off from the side of a moving car by a car standing on the side-track while attempting to get down to uncouple moving cars.²

3411. A rule of a railroad company prohibiting switchmen from going between cars to couple or uncouple them cannot be invoked to defeat the action of a switchman for injuries sustained when coupling cars while standing on a running-board placed on the tender for switchmen to ride on.³

3412. Where the rules prohibited brakemen from coupling or uncoupling cars except with a stick, and from going between the cars, under any circumstances, for the purpose of coupling, uncoupling or adjusting pins, etc., when an engine is attached to such cars or train, it was held that the rule had no application to a brakeman who was injured while attempting to remove a pin while standing on the foot-board of a tender which was moving slowly backwards, to be coupled on cars, on the ground that he was neither coupling or uncoupling cars nor was the engine attached to any cars or train. It was said the conditions existing here were overlooked in framing the rule.⁴

3413. A brakeman was injured while riding on the pilot of an engine and about to couple the engine to cars on a spur track. The pin was not properly placed, being in the draw-head of the flat-car, so that the coupling could not be

¹ Alabama G. S. R. Co. v. Ritchie (Ala.), 20 So. 49.

² Schaub v. Hannibal & St. J. R. Co., 106 Mo. 74, 16 S. W. 924.

³ Richmond & D. R. Co. v. Jones, 92 Ala. 218, 9 So. 276.

⁴ Richmond & D. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290.

made without it first being withdrawn; and the evidence was that it was dangerous to attempt to make the coupling under such circumstances. The rules required the plaintiff to be very particular to notice the speed at which cars are moving, when coupling, and if moving at a dangerous rate no attempt must be made to couple by going between the cars, and further declared that it is dangerous to uncouple or attempt to place links or pins or draw-bars while cars are in motion, and is strictly forbidden. A judgment for plaintiff was reversed, but the question of his contributory negligence was not determined though discussed.¹

3414. Upon a second appeal, the evidence being substantially the same, no reference is made as to the effect of the plaintiff's violation of a known rule, but rather the whole question is made to turn upon whether his conduct was proper in the manner in which he attempted to do the prohibited act. The negligence charged being that of the engineer in not checking the speed of his engine, it was held that the question of the plaintiff's negligence was for the jury.²

2. Prohibiting Boarding Moving Cars.

3415. Where an employee attempted to board a car while in motion, which act was prohibited by the rules of the company, it was held that he could not recover.³

3416. Where a rule prohibited all persons from standing on top of covered cars while passing through truss bridges, and another forbade all persons from boarding engines and cars while in motion, and under no circumstances to stand on the track and board engines and cars while approaching them, and a conductor of a freight train, who had stopped his train on one end of such a bridge, and as the train moved on climbed to the top of a box-car, being prevented from

¹ *Baltzer v. Chicago, M. & N. R. Co.*, 83 Wis. 459.

³ *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83.

² *Baltzer v. Chicago, M. & N. R. Co.*, 89 Wis. 257.

going back to the caboose by obstructions along the track, and was forced from the car by a scaffold suspended over the bridge, and there was evidence to the effect that it was customary, and sometimes it became the duty, of freight conductors to stand on top of the cars when assisting in breaking and signaling, it was held that his violation of the rule was such negligence as would prevent a recovery; that it did not appear he was upon the car in performing any duty which might require his presence there; that it was his duty and within his power to have had the caboose stopped before it reached him.¹

3417. Where an engineer of a yard-engine left his engine on a dark night to observe what signals were being given, and while his engine was backing attempted to mount it, and in so doing caught his foot in some wires stretched along the track, the location of which he knew, and he also was charged with knowledge of a rule of the defendant forbidding the jumping on or off trains or engines when in motion, it was held that the rule was reasonable, and that the plaintiff could not recover, as his violation of the rule was negligence contributing to his injury. That it did not appear that his attention was necessarily diverted by the character of his duties, or that there was at the time any such emergency as might call for his mounting the engine while in motion.²

3. Prohibiting Flying Switches.

3418. Where a rule prohibits the making of flying switches, and an employee with knowledge of such rule is injured while so engaged, he cannot recover.³

3419. Where a rule prohibited conductors and engineers from making flying switches, and a brakeman was injured

¹San Antonio & A. P. R. Co. v. See CONTRIBUTORY NEGLIGENCE, Wallace et al., 76 Tex. 636, 13 S. W. 1218 et seq.
565.

²Overby v. Chesapeake & Ohio R. Co., 37 W. Va. 524, 16 S. E. 813.
³Pilkinton v. Gulf, C. & S. F. R. Co., 70 Tex. 226, 7 S. W. 805.

while working under the direction of an engineer, and it appeared the manner in which the car was placed upon the side-track was the usual and customary way of performing that service, it was held that such brakeman was not guilty of contributory negligence, even though he knew the rule.¹

3420. A rule of a railroad company which prohibits the making of running switches except when absolutely necessary applies as well to the kicking of cars into switches. Hence it was held that an experienced brakeman who was injured by getting his foot caught in an unblocked frog while running in front of cars that were being kicked into a switch to arrange the couplings was guilty of contributory negligence which prevented a recovery.²

3421. Where a conductor was injured while in the violation of a rule of the company forbidding a running switch, it was said that this did not preclude him from recovering from the company, it appearing that this was the only practicable way of putting cars on the particular switch, and that it had been so habitually resorted to as to raise the presumption that the company was aware of and approved it.³

4. Requiring Use of Coupling-sticks.

3422. If an employee enters into or remains in the service of a railroad company with a knowledge of its rules and regulations, he must be held as undertaking to acquiesce therein, and, if he is afterwards injured by reason of his violation of such rules and regulations, he cannot claim that their reasonableness is a question to be decided by a jury. If he has suffered injury brought about by a violation of the plain instructions of his principal, he cannot hold the principal liable therefor. This was said where a rule prohibited coupling cars by hand, and directed that a stick be used.⁴

¹ *Union Pacific R. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774.

² *Sheets v. C. & I. C. R. Co.*, 139 Ind. 682, 39 N. E. 154.

³ *Alexander v. Railroad Co.*, 83 Ky. 589.

⁴ *Wolsey v. L. S. & M. S. R. Co.*, 33 Ohio St. 227.

3423. Where a rule provided that coupling cars should be done by the use of a coupling-stick, and coupling by hand was forbidden, and it appeared that a switchman was injured while coupling by hand, caused by a dangerous hole in the track, it was held that a refusal to instruct that, if he was injured by reason of neglect to use the coupling-stick, he could not recover, was error, although the jury were charged that to entitle the plaintiff to recover it should appear that the hole in the track was the sole cause of his injuries.¹

3424. Where a brakeman familiar with a rule prohibiting coupling cars except with a stick, or from going between cars for that purpose, when an engine was attached, violated said rule, it was held he could not recover for injuries received while coupling by hand.²

3425. Where a railroad company adopts a rule requiring cars to be coupled with a stick and forbidding employees to go between cars to couple by hand, and employees are bound to its observance by their contract of employment, it is the duty of the company to furnish cars that may be coupled with a stick with reasonable safety. Hence where a brakeman with knowledge of the rule first failed to make a coupling with a stick on account of defective draw-heads, signaled the engineer to stop, and after the train had stopped went between the cars, and his position was known to the engineer, who, before the former could make the coupling, moved the train, it was held error to direct a verdict for the defendant, since, notwithstanding plaintiff's negligence, the company was liable for a reckless or wilful injury.³

3426. Where cars became uncoupled by the breaking of a defective link, and in attempting to couple them with his hands a brakeman caught his foot in a hole between the cross-ties and was injured, and the rules in force, which he

¹ Louisville, etc. R. Co. v. Ward, Co., 91 Ala. 514, 8 So. 776 (modified in 97 Ala. 187, 13 So. 209); Louisville

² Richmond & D. R. Co. v. Free, & N. R. Co. v. Watson, 90 Ala. 68, 8 So. 249.

³ Hisson v. Richmond & D. R.

knew, prohibited coupling by hand and required the use of a stick, it was held that the proximate cause of his injury was the violation of the rule and he could not recover.¹

3426a. Where it appeared that a rule requiring the use of coupling-sticks had not been enforced, and that upon application for sticks at the company's store-house brakemen were unable to procure them, it was held that the question whether observance of the rule had been waived, and whether a brakeman was negligent in attempting to couple by hand, were questions for the jury.²

3427. Where the rules provided that couplings or uncouplings should be made with a stick, and going between cars for such purpose was prohibited, and a brakeman was injured while attempting to uncouple cars under orders of the conductor, which attempt was by hand, and could not, under the circumstances, have been accomplished with a stick, and the direct cause of the accident was the sudden reversing of the engine through the neglect of another, it was held that though the plaintiff was negligent the proximate cause of the injury was the negligent conduct of the brakeman giving the signal, and that plaintiff was not guilty of contributory negligence in obeying the conductor.³

3428. The failure of a brakeman to use, in making couplings, a coupling-stick, the receipt of which he had acknowledged in writing and promised to so use, was held not such negligence as would bar his right of recovery, where it appeared that at the time he signed such writing he was told that it was required as a mere form, and where it also appeared that in order to use such stick it was necessary for brakemen to carry it about their person in a belt, and that it caused more danger of falling while running on top of cars than was compensated by its security against injury in making couplings.⁴

¹ Pryor v. Louisville & N. R. Co.,
90 Ala. 32, 8 So. 55.

³ Richmond & D. R. Co. v. Rudd,
88 Va. 648, 14 S. E. 361.

² Hannigan v. Lehigh & H. R. Co.,
91 Hun, 300.

⁴ Louisville & N. R. Co. v. Foley,
94 Ky. 220, 21 S. W. 866.

3429. Where a brakeman, inexperienced when employed, which was a month prior to the accident, was injured while coupling cars by hand under the orders of the conductor, and the rules required the use of a stick, but nevertheless the employees generally failed to use the stick, regarding it as a useless appliance, and the plaintiff had receipted for a stick, but none had in fact been furnished him, and he had performed his duties as usual with the other brakeman, it was held he could not predicate a right of recovery upon the failure of the company to furnish him with a stick.¹

3430. Where it was alleged that the plaintiff was inexperienced as a switchman, and was injured a few hours after his employment while attempting to couple cars without the use of a stick, required by the rules, and it appeared such rules had been read to him, though he did not know how to use a stick and had not been instructed, and a stick was not furnished him prior to the accident, and it also appeared that another rule enjoined any attempt to make couplings unless the appliances were known to be in good order, and that the coupling-link was stuck at the time of his attempt to make use of it, it was held that there was no error in submitting the question of his right to recover to the jury.²

3431. Where an employee was injured while coupling cars by hand, and it appeared a coupling-stick had been given him, and he was told to use it, and there was no evidence to show what it was, how used, nor of any rule requiring it to be used, or the reasonableness of such a rule, or as to negligence on account of failure to use it, or that such failure contributed to the injury, and there was testimony that it was more dangerous to use it than to couple by hand, it was held not error to refuse to charge that if the failure to use such appliance contributed to the plaintiff's injury he could not recover.³

¹ Louisville & N. R. Co. v. Bryant Co., v. Moore, 3 Tex. App. 416, 22 (Ky.), 22 S. W. 606. S. W. 272.

² Bonner, Receiver of Railway ³ Bonner et al. v. Hickey (Tex.), 23 S. W. 85.

3432. Where a brakeman was injured by coupling cars with his hands, a rule being in force requiring it to be done by the use of a stick, and there was evidence showing that, even if a stick had been used, it required his going between the cars to the same extent, and that injury would have followed in the same manner, it was held that violation of the rule was no defense, as it did not contribute to the injury.¹

3433. Where an employee while coupling cars in a way prohibited by a rule, that is, without the use of a stick, was injured through defects in the cars, and it was shown he would have been injured even if the rule had been observed (in other words, the use of the stick would not have protected him), it was held the violation of the rule would not prevent a recovery.²

3434. Where a brakeman while in the act of uncoupling cars attached to an engine, with his hands, was injured by the sudden backing of the engine, he being provided with a stick, which he had been taught how to use, and who fully understood a rule that brakemen were prohibited from uncoupling cars except with a stick and must not go between cars for coupling or uncoupling when an engine is attached, it was held he could not recover; that his own negligence was the cause of his injury; and this result was not affected by the fact that his fellow-brakeman gave a signal for backing the cars without first ascertaining whether the plaintiff was between them in violation of a rule of the defendant company.³

3435. Where the evidence was that the plaintiff had been furnished with a coupling-stick until he learned how to couple without it, and that his injury was received after he had learned to couple without a stick, and he had on many occasions done so, some of the instances occurring in the presence of his superior officers, who made no objection, it was held

¹ Reed v. Burlington, C. R. & N. R. Co., 72 Iowa, 166.

³ Richmond & D. R. Co. v. Pan-nill, 89 Va. 552, 16 S. E. 748.

² White v. Louisville, N. O. & T. R. Co., 72 Miss. 12, 16 So. 248.

that the court properly denied a request by the defendant to charge the jury that if the plaintiff in undertaking the service was furnished with a coupling-stick and directed to use it in coupling, but did not use it at the time of the injury, and attempted to make the coupling with his hand instead of the stick, and was hurt in making such attempt, he could not recover.¹

5. Requiring Examination of Appliances.

3436. Where a rule required employees to frequently examine the brakes, couplings and running gears of cars on their train and to know that they were in good order, a failure to comply with such rule, if known to the employee, was held to constitute negligence on his part.²

3437. Where the printed rules required that brakemen should test the hand-brakes upon cars before starting, and a brakeman who knew the rules failed to do so, and in going down a steep grade the brakes would not work, and as a result the train ran away causing injury to such brakeman, it was held that as his disobedience of the rule caused the accident he could not recover. It was said: It seems that, had the plaintiff been unacquainted with the rules, he would not be entitled to recover, as with full knowledge of the dangers it was incumbent upon him and his associates to ascertain before reaching the down grade that a sufficient number of the brakes to properly check the train were in order.³

3438. Where a rule provided that "every employee . . . is hereby warned that, before exposing himself or his fellow-employee to danger, it will be his duty to examine the condition of all machinery, tools, cars, engines or trucks that he is required to use in the performance of his duties, satisfying himself as far as he reasonably can that they are in safe

¹ Central Railroad & Banking Co. v. Maltby, 90 Ga. 630, 16 S. E. 953. ³ La Croy v. N. Y., L. E. & W. R. Co., 132 N. Y. 570.

² L. E. & St. L. C. R. Co. et al. v. Utz, 133 Ind. 265.

working order. It is the right and duty of every employee to take sufficient time to make such examination, and to refuse to obey any order which exposes him or his fellow-employee to danger," and it appeared an experienced brakeman was injured while in the attempt to couple cars, as was alleged, by reason of a defect in a draw-bar, it was held that it was his duty to examine into the coupling arrangement of both cars before he attempted to couple them.¹

3439. Where the rule charged brakemen with the management of brakes and the proper display and use of signals, and that they must examine and know for themselves that the brakes, ladders and running-boards, steps, etc., which they are to use are in proper condition, and if not put them so, or report them to the proper parties and have them put in order before using, it was held that a brakeman who knew of such rule, and also that the nut on top of the standard of the brake, used to hold the brake-wheel on, was off, but without putting it in proper condition or reporting it to the proper parties attempted to use it, whereby the wheel came off and he was thrown upon the track and injured, could not recover.²

3440. Where a published rule forbade employees to go between cars to make a coupling unless the draw-head and other apparatus were known to be in good order, with which a yard-master was familiar, and notwithstanding such rule he attempted to couple cars after he ascertained that the coupling appliances were defective, and knew the act was more than ordinarily dangerous, it was held that attempting the act in violation of the rule was gross negligence contributing to his injury.³

3441. Rules of a railroad company that employees are to see that the machinery and tools are in proper condition, and if not in such condition to see that they are put so be-

¹Karrer v. D., G. H. & M. R. Co.,
76 Mich. 400.

³St. Louis, I. M. & S. R. Co. v.
Rice, 51 Ark. 467, 11 S. W. 699.

²Beall v. Pittsburg, C. & S. L.
R. Co., 38 W. Va. 525, 18 S. E. 729.

fore using them, and that trainmen handling cars are to see if they are safe to be handled, and not to handle them unless they are safe, are reasonable and proper; and brakemen are bound to make such examination of the machinery and cars they use as is consistent with the opportunities afforded while attending to other duties, and if injury arises from failure in this respect to one such he is guilty of contributory negligence.¹

3442. Where a rule provided that "conductors and trainmen are required to be at terminal stations thirty minutes before leaving-time of their trains; brakemen must examine the coupling apparatus and brakes before train starts and report to the conductor such as are not in good order," it was held that *prima facie* it was incumbent upon brakemen to examine brakes only at terminal points before starting of a train; that it was improper to leave to the jury the determination of the meaning of the rule, and evidence was not admissible to show how employees interpreted or acted upon it, without showing that plaintiff so understood or so acted on the rule or knew that other employees did so. An ambiguous rule should generally be taken in its stronger sense, against the corporation and in favor of the employee.²

3443. Where an answer set out in terms a rule of a railroad company requiring its brakemen to examine and know for themselves that the brakes, ladders, etc., which they were to use were in proper condition, and if not, to put them in condition or report for repairs, and averred knowledge on the part of the plaintiff, a brakeman, and neglect to obey it, and the trial court having sustained a demurrer to a reply to such answer which set up a lack of opportunity on the part of such brakeman to examine the car in question, it was said that the duties put upon the brakeman by the rule added very little to the duties placed upon him by the

¹ Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 So. 176; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. 360.

² Western & A. R. Co. v. Moore, 94 Ga. 457, 20 S. E. 640.

rules of law; something more than the mere making of a rule requiring brakemen to make inspection of the implements and machinery used by them is necessary in order to shield the master from the consequences of a failure to perform the duties of furnishing safe implements and machinery imposed by law upon him. In our opinion the court erred in sustaining such demurrer. The reply shows very clearly that the deceased had neither the appliances nor the opportunity to make the inspection required by the rules, and he was thereby relieved of that duty in so far as it was imposed upon him by such rules.

The facts were that a brakeman was injured by the breaking of a brake-staff. It was alleged in the complaint that it had been broken for two months prior to the accident and defendant had notice. The answer, among other things, denied that the company had notice, and averred that the brake-staff had been carefully inspected without discovery of the defect, and that the defect was of such a character that it could not be discovered without detaching the brake-staff and testing it with a hammer. The reply was to the effect that the brakeman was called but a short time prior to the train going out, and was engaged continuously with his lamp signals, and in coupling and loosening brakes, so that he had not time to examine for and discover the defect in the brake-staff, and also that it was dark, the yard was not lighted, and he only had an ordinary lantern, which was insufficient. That an inspection by regular inspectors would have discovered the defect, but a casual examination would not.¹

3444. If by the rules of a railroad company, known to an employee, the duty of making inspection of a freight car was in fact cast upon him, he cannot recover for injuries caused simply by a failure to make the inspection. The negligence in such case would be his own. The facts are not stated in the report of the case.²

¹ Chicago, St. L. & P. R. Co. v. Gruff, 132 Ind. 13, 31 N. E. 460. See Fry, 131 Ind. 319, 28 N. E. 989. APPLIANCES, 264 et seq.; ASSUMED

² Fort Wayne, C. & L. R. Co. v. RISKS, 796 et seq., 830 et seq.

6. Requiring Section-men to Flag Curves.

3445. Where a section-foreman in charge of a hand-car fails to send a flag around a curve according to the rules of the road, and he is injured by collision with a train, he will be held guilty of contributory negligence.¹

3446. Where a section-foreman was injured by being run into upon a curve by a train, and he failed to observe a rule requiring him to flag curves and keep a constant lookout, it was held that he could not recover, even though the engineer failed to give signals as required by the rules.²

3447. Where a railroad company promulgated a rule which directed section-men at all times to be prepared for special or irregular trains, an employee taking service with such company becomes bound by the rule, and such an employee, though directed specially to proceed to a certain place upon his car, was bound not to enter a curve where an irregular train might come upon him without taking precautions to discover its approach and avoid a collision. It was said by the court: "We are unwilling to hold that a railroad company which has made such a rule is bound to give special notice to the section-men along the line as each irregular train is sent over the road."³

3447a. It was held that it was negligence on the part of foremen in charge of hand-cars to disregard a rule which required them to carefully flag their hand-cars against special trains, and to use special care in running hand-cars where by reason of curves risk is involved.⁴

7. Protection of Car-repairers.

3448. Where an employee while at work upon a car situate upon the house track in defendant's yard, which was used for loading and unloading cars and for repairs which

¹ Southern Pacific R. Co. v. Ryan (Tex. App.), 29 S. W. 527.

² Louisville & N. R. Co. v. Mar-kee, 103 Ala. 160, 15 So. 511.

³ Cincinnati, L. St. L. & C. R. Co. v. Lang, 118 Ind. 579.

⁴ Kansas & A. V. R. Co. v. Dye, 70 Fed. 24.

took only a few moments, and the rules required such repairer to place flags to indicate he was at work, but which rule was not enforced as to such track, was injured by another car being struck by a switch-engine and forced against the one under which he was at work, causing him injury, and it appeared that a defect in the engine, which prevented the engineer from controlling it promptly, was the cause of the moving of such car, and there was evidence that the speed would have been the same even if flags had been displayed, it was held that the rule was not violated, and that the plaintiff's act did not contribute to the injury.¹

3449. The neglect of the car-repairer to put out the signal required by the rules will not be excused on the ground that the company had never before had a train on the repair track, where the car he was repairing was attached to a train on that track.²

3449a. A car-repairer is guilty of negligence as a matter of law in disregarding a rule which requires him, when going under a car, to display the required signal.³

3450. Where the rules provided for a display of flags on cars that were being repaired on a repair track, and that it was the duty of the switchman or fireman on the engine to call out to the men on the repair track whenever the engine came in, and a carpenter at work between cars, who was not shown to have known of the rules, was injured by cars being pushed against those upon which he was at work, and the switchman did give the warning, though the plaintiff did not hear it, it was said: It is a duty resting upon railroad companies for the protection of their employees to adopt reasonable rules and regulations or methods for conducting their business, such as will, if properly pursued and carried into effect, afford a reasonable degree of safety to its employees, while engaged in their duties, against extraordinary or un-

¹ *Texas & N. O. R. Co. v. Wynne* (Tex.), 22 S. W. 1064.

³ *Illinois Central R. Co. v. Winslow*, 56 Ill. App. 462.

² *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250.

necessary dangers. The duty does not extend to insuring the safety of employees, but only to the exercise of reasonable care and foresight in so providing rules and regulations. It was held that whether or not this was done was a question for the jury to ascertain from the evidence.¹

3451. It was held that a rule providing that "car-repairers, in making repairs to cars standing on main track or side-track, must protect themselves by placing a blue signal in the draw-head or on the platform or step of the car at each end of the train to prevent the cars from being coupled to or moved while they are making repairs," did not apply to cars located upon a repair track in the yard.²

8. Regulating Speed of Trains.

3452. The violation of the rules by propelling a train at a greater rate of speed than is permitted by them is not of itself contributory negligence. No rate of speed of itself is such negligence.³

3453. Where an engineer ran his train on a sharp curve at a high rate of speed for such a curve and against express orders to him requiring him to go slow at such place, and he was injured by the engine and some of the cars leaving the track, it was held there could be no recovery even though the lowness of the outer rail was the cause of the accident.⁴

3454. Where a locomotive engineer in the employ of the defendant was injured in consequence of his engine being thrown from the track, the negligence charged against the defendant being the allowing of the rails of its track to become

¹ International & G. N. R. Co. v. Hall, 78 Tex. 657, 15 S. W. 108.

² Quick v. Indianapolis & S. L. R. Co., 130 Ill. 334. See APPLIANCES, 322, 323; ASSUMED RISK, 471, 622; CONTRIBUTORY NEGLIGENCE, 1252, 1253; FELLOW-SERVANTS, 1824, 2065, 2289, 2477, 2488; INSTRUCTION AND WARNING, 2688 et seq.; RULES, 3292 et seq.

³ Fort Worth & D. C. R. Co. v. Thompson, 2 Tex. App. 170, 21 S. W. 138; Gulf, C. & S. F. R. Co. v. John et al. (Tex. App.), 29 S. W. 558. See International & G. N. R. Co. v. Arias (Tex. App.), 30 S. W. 446.

⁴ Robinson v. West Virginia & P. R. Co. (W. Va.), 21 S. E. 727.

worn, splintered and defective, the defendant contending that at the time he was injured he was driving his engine at a high and dangerous rate of speed in violation of the defendant's rule, the time schedule showing that at the place of injury the rate of speed was twenty-four miles an hour, and a rule required engineers to reduce the rate of speed when the track was in bad order, and the evidence as to the rate of speed at the time was, on the part of some of the witnesses, as high as forty-two miles an hour, the plaintiff admitting it was as high as thirty miles an hour, it was held that in no view of the evidence was the plaintiff entitled to recover. A remanding order was refused although the verdict on which the judgment was rendered was the last of three concurring verdicts in favor of the plaintiff.¹

3455. If compliance with a general rule is rendered impossible by other and inconsistent orders given by the master to his employee, negligence cannot be imputed to the employee for not following the general rule. This was said and applied where it appeared that an engineer failed to comply with a rule requiring him to reduce the speed of his train, while running through a particular yard, so as to have it completely under control, and it also appeared that this could not be done if he conformed to the time-table. It was held that the rule was modified by the time schedule.²

H. Failure to Observe by Servant Who is to Execute.

3456. Where the rule of a company, made for the protection of men engaged in repairing cars on the track, is ample if properly observed, the master cannot be made liable on the ground that one whose duty it was to obey it had neglected so to do, whereby injury was caused to the servant making repairs.³

¹ Illinois Central R. Co. v. Patterson, 93 Ill. 290.

² Hall v. C. B. & N. R. Co., 46

Minn. 439. See, also, Pennsylvania R. Co. v. Roney, 89 Ind. 453.

³ Peterson v. C. & N. W. R. Co., 67 Mich. 102.

3457. Where a car-repairer was injured by the act of a switchman sending cars against one which the former was repairing, and it appeared the company had published suitable rules, which, if observed, insured him protection, and that every employee was required to acquaint himself with the rules and have a copy thereof in his possession, and that the injured employee had observed the rule and properly placed the required signal upon the car, it was held that negligence could not be charged against the company.¹

3458. It is the duty of a railway company to make all reasonable and proper regulations for the safety of its employees, and this being an affirmative fact it devolves upon the company to show an observance of the duty, when sued by a servant for an injury received while in its service and negligence is shown. On such a showing the presumption will be that the negligent act was done in violation of its rules, and the company will not be liable for the acts of its servant disobeying such regulations, unless the servant inflicting the injury was incompetent and the company knew it or had reasonable and proper means of knowing it.²

3459. There is an implied reservation accompanying every order that it is not to be executed where it cannot be done with reasonable regard to the safety of human life. This was said where the engineer of a train had, upon request being made by an employee, told him that the train would not start for fifteen minutes, and such employee, relying upon such information, started on a hand-car in front of the train, and in less than eight minutes he was overtaken by such train while on the track and was injured. The train was started in obedience to the orders of the conductor, who was not informed as to what the engineer had told such employee.³

3460. Where one servant failed to put up a danger signal as required by the rules, whereby another was injured, it

¹ *Corcoran v. D. & W. R. Co.*,
126 N. Y. 673.

³ *Hawley v. C. & Q. R. Co.*, 71
Iowa, 717.

² *Pittsburg, Ft. W. & C. R. Co. v.*
Powers, 74 Ill. 341.

was held that the rule was not thereby evaded by the failure of one employee to observe it, and his failure was no excuse on the part of the servant injured.¹

3461. Where a section-foreman was injured by being run into upon a curve by a train, and he failed to observe a rule requiring him to flag curves and keep a constant lookout, it was held he could not recover even though the engineer failed to blow the whistle, as was required by the rules.²

¹ Central R. & B. Co. v. Kitchens,
83 Ga. 83, 9 S. E. 827.

² Louisville & N. R. Co. v. Markee,
103 Ala. 160, 15 So. 511.

CHAPTER XIX.

SCOPE OF EMPLOYMENT.

- A. *Rule*, 3462 et seq.
- B. *Contrary*, 3475 et seq.
- C. *Services Within the Employment*, 3485 et seq.
- D. *The Effect of Obedience to the Direction of a Superior Servant*, 3494 et seq.
- E. *Scope of Authority of the Directing Servant*, 3508 et seq.
- F. *The Effect of Obedience to the Request of a Servant Not Superior*, 3514 et seq.
- G. *Voluntarily Performing Service*, 3518 et seq.
- H. *Minors*, 3530 et seq.

A. *Rule.*

3462. If a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same knowing their dangerous character, though unwillingly and from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action against the master for such injuries.¹

3462a. The liability upon the master in cases of injuries to a servant received in a dangerous employment outside of that from which he is engaged arises not from the direction of the master to the servant to depart from the one service and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years or unable to comprehend the danger. This was held where an employee in a quarry was

¹ *Leary v. Boston & Albany R. Co.*, 139 Mass. 580; *Prentiss v. Kent Mfg. Co.*, 63 Mich. 478; *Wheeler v. Berry et al.*, 95 Mich. 250, 54 N. W. 876;

directed by his foreman to leave his regular employment temporarily and assist in the breaking of stone by means of wedges, and while cleaning out debris a piece of the stone broke and fell upon him.¹

3463. When an employee of mature years and of ordinary intelligence and experience is directed to do a temporary work outside of the business he was engaged to do, and consents to do such work without objection on account of his want of knowledge, skill or experience in doing such work, no negligence on the part of his employer can be predicated upon the ground that he was directed to perform a service outside of his regular employment.²

3463a. When a servant is injured while in the performance of duties outside of the scope of his regular employment he will nevertheless be held to have assumed the risks incident to those duties.³

3464. The rule was stated (facts not given) that where the master orders the servant to work temporarily in another department from that for which he was employed, where the work and employees are different, that such servant assumes the risk of such special employment unless there are dangers incident to it which in consideration of his known inexperience or of their occult nature the master should have pointed out to him and did not. An employee assumes all the risks of his employment, whether ordinary employment or special employment, and stands in the same relation he would have borne had he been specially employed to do the work.⁴

3465. A master is not liable for injuries to an employee resulting from causes open to the observation of such employee, and which it requires no special skill or training to foresee were likely to occasion him harm, although he was at the time engaged in the performance of a service which

¹ Reed v. Stockmeyer, 74 Fed. 186.

³ Wormell v. Maine Central R.

² Cole v. C. & N. W. R. Co., 71

Co., 79 Me. 397.

Wis. 114.

⁴ Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106.

he had not contracted to render. When a servant of mature years undertakes any labor outside the duties he has engaged to perform, the risks of which are equally open to the observation of himself and the master, the servant takes upon himself all such risks. As it appeared, however, that the servant was, at the time of the injury, assisting to hold a heavy wheel, which was work outside of his employment, and it fell into a hole in the floor, which defect was known to the master and unknown to the servant, it was said it could not be held as matter of law that the employee had equal opportunity with the master of knowing of the defect.¹

3466. If a foreman employed by a corporation has authority to employ and discharge servants, it is within the scope of his authority to use reasonable force to remove a discharged workman from the shop, and the corporation will be liable if he uses excessive force for that purpose.²

3467. The scope of duty within which a servant is entitled to protection is to be defined by what he was employed to perform, and what, with the knowledge and approval of his employer, he did perform, rather than by verbal distinction of his position.³

3468. Where the foreman of a gang of men engaged in constructing buildings and bridges for a railroad company was directed to take his engine and men and do some switching, and he undertook such work without objection, and was injured, it was held that his action could not be maintained. It was said: He made no objections to doing the work on the ground that it was dangerous, or that he had not sufficient knowledge or experience to do the same with safety to himself and the men under his charge. Under these circumstances no negligence can be attributed to the company for directing him to do the work. He undertook voluntarily, knowing the general danger of the employment, and the

¹ *Cummings v. Collins*, 61 Mo. 520.

³ *Rummell v. Dilworth*, 131 Pa.

² *Rogahn v. Moore Mfg. Co.*, 79 St. 509.

Wis. 573.

rule applicable to work done in his ordinary employment must be applied to work done by him under such order.¹

3469. Where a young man was told that he could either run a split-saw or lay off, and he was injured while engaged in such service, it was held he could not recover upon the ground that such work was beyond the scope of the work he was employed to do.²

3470. Where a brakeman upon a passenger train was directed with the train crew to do switching in the company's yard, and he complied with such directions and performed such duties while at such station for two months, when he was injured while in the act of coupling cars, one of which was loaded with lumber projecting over the end of the car, it was held he could recover from the company upon the ground that the service was beyond the scope of his employment, and therefore the risk was not assumed.³

3471. Where, however, an employee was injured while using a circular saw in defendant's factory, and one of the grounds urged in favor of a recovery was that the work was outside of the duties he was engaged to perform, and there was evidence to the effect that he protested against performing such work and did it unwillingly, it was said, even if the work was without the scope of his employment, he could not, by his protest, cast all the risk of the accident upon the employer. An employee under such circumstances has his choice either to leave his employment or to remain and assume all the risks incident to the work he knows he is expected to do. It was further said that *Railway Co. v. Bayfield*, 37 Mich. 205, was decided entirely upon the inexperience of the boy; that *Broderick v. Depot Co.*, 56 Mich. 261, was clearly distinguishable.⁴

3472. Where an employee was told to select lumber from a body of material containing that which was fit and also that

¹ *Cole v. C. & N. W. R. Co.*, 71 Wis. 114.

² *Prentiss v. Kent Mfg. Co.*, 63 Mich. 478.

³ *Jones v. L. S. & M. S. R. Co.*, 49 Mich. 573, 14 N. W. 551.

⁴ *Wheeler v. Berry et al.*, 95 Mich. 250, 54 N. W. 876.

which was unfit for the purpose of constructing a staging, and by reason of the selection of unfit material the staging broke and he was injured, it was said if he undertook to make the selection, though it was a duty outside the scope of his employment, and not properly assignable to him, he cannot be excused for negligence in not performing it with such skill as he actually possessed.¹

3473. Where a railroad employee of mature years and long experience was injured while coupling cars in obedience to the orders of his immediate superior, it was held that he could not recover therefor because that duty was outside of his employment, when he made no objection to performing it, and there was no threat of dismissal in case of refusal.²

3474. Where a trammer in a mine was directed by the captain to help a miner fix the roof, and while doing so he was injured by ore or rock falling from the roof, which had just been tested in his presence and which seemed to be solid, and it appeared he had been tramming for four winters in this and other stopes, it was held that he must have known the danger of this temporary employment, and, having undertaken it without objection, he assumed the risk.³

3474a. Where an employee was injured while working with a steam-hammer, and it was urged that the work that he was doing at the time was without the scope of his employment, the plaintiff having testified that he was employed to wheel scrap-iron from the yard into the shop where the hammer was, and to fill the tanks with water and bring ice, and that the first time that he had worked at the hammer was the morning of the accident, and his immediate superior having testified that when first employed by the company he was liable to be put to do anything he was called upon to do in or about the shop, it was said: However this may be, it appears from his own testimony that he had been at

¹Boettger v. Scherpe & Koken ³Paule v. Florence Mining Co.,
A. I. Co., 124 Mo. 87, 27 S. W. 466. 80 Wis. 350.

²Hogan v. Northern Pacific R.
Co., 53 Fed. 519.

work there for two months, made no objection when called upon to work at the hammer, and voluntarily undertook the employment. It was held that no ground was presented for recovery.¹

B. Contrary.

3475. The servant's implied assumption of risk is confined to the particular work or class of work for which he is employed. There is no implied undertaking except as it accompanies and is a part of the contract of hiring between the parties. When the servant voluntarily and without direction from his master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking, and if he is injured he must suffer the consequences. On the other hand, if the servant, by the order of the master, is carried beyond the contract of hiring, he is carried away from his undertaking as to risks. If the master orders him to work temporarily in another department of the general business, when the work is of so different a character and nature that it cannot be said to be within the scope of the employment, and when he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employees. Whether or not the servant may be negligent in obeying such orders will depend upon the facts and circumstances of each particular case. They may show he voluntarily assumed the increased risk, or he may show that he obeyed under threats of discharge or under such circumstances as that he might well expect a discharge if he disobeyed. Hence it is that when a servant is thus, by order of his master, put at work outside of his employment, and is injured by reason of defective machinery, railroad tracks, etc., without his fault, the master is liable regardless of the care he may have exercised to keep them in a safe condition.

¹Hanrathy v. Northern Central R. Co., 46 Md. 280.

The master impliedly assures him, not only that he has exercised reasonable care in respect to the safety of the appliances, but that they are in a safe condition and fit for the business for which they are used. This was said in reference to a section-hand ordered to couple cars.¹

3476. When the master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But where the apparent danger is not such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed.²

3477. The doctrine of the Indiana court was applied where it was alleged that a servant employed to repair cars on special tracks made for that purpose was injured while performing his usual duties upon another track not specially devoted to such special purpose. In fact, because the work was being performed upon a different track, such work was outside the scope of his employment. It was said: If the master requires of him a service outside of the duties ordinarily incident to his employment and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even though the dangers attending it are obvious.³

3478. Where a servant employed as a helper to a boiler-maker was injured while performing a service which required him to sit on a rail of a track upon which a large crane was moved, and the crane, while he was so engaged,

¹ *Pittsburg, C. & St. L. R. Co. v. Iet*, 129 Ind. 327; *Cincinnati, H. & Adams*, 105 Ind. 151. *I. R. Co. v. Madden*, 134 Ind. 462.

² *Nall v. Railway Co.*, 129 Ind. ³ *Louisville, E. & St. L. R. Co. v. Hanning et al.*, 131 Ind. 523.

moved over his arm, and it appeared that the work he was doing was such as he had not before been required to do, it was said that while the servant assumes the hazard of his employment, including the negligence of fellow-servants, this is confined to those risks. If the servant is ordered to temporarily work in another department of the general business, when the work is of such a different character that it cannot be said to be within the scope of his employment, he will not, by obeying the orders, necessarily assume the risks incident to the work.¹

3479. When a master commands a servant to go outside of his regular employment to do work which is attended with special danger, and the servant does the work at the time and in the way directed, the fact that the servant knew the work was dangerous does not exonerate the master or make the servant guilty of contributory negligence, unless the character of the danger be so patent and extreme that no one but a foolhardy, reckless man would attempt it. When, however, the servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work is to be done, but is told to do a particular thing, and has such discretion that he can have the control over the means, time and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he will be charged with contributory negligence.

This was said where a repairer was directed to repair a water tank, and his duty was to stand on a platform about twenty-one inches wide, and while performing his duties he slipped and fell, owing to the narrowness of the platform and its icy condition. It was held that the danger was equally obvious to the servant and the master; that the act was apparently reckless in the absence of his taking the precautions open to him for his safety, and that it did not ap-

¹ Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. 261.

pear but that the means and manner of doing the work, that is, of providing for his safety, were within his discretion.¹

3480. Where an employee, working with a slab car which was defective, was told by the foreman to fix it up as best he could and he would have it repaired, and such employee voluntarily took a piece of lumber to a saw in the mill, and personally undertook, by the use of the saw, to make such a piece as he desired for making the temporary repairs, and in the use of the saw he was injured, it was held that he had no ground for recovery; that the order of the foreman did not extend to a direction to use a dangerous machine, with the use of which he was inexperienced.²

3481. When the perils of an employment are increased temporarily, it cannot be said that the servant assumes the risk or should demand their removal from the employer. Hence, when a shaft had been put in a room over night, where many girls were employed, it being extra dangerous by reason of its height, the master intending to remedy the defect as soon as there was time, and one of such girls was killed by her clothing getting caught in the shaft, it was held the master was liable.³

3482. A distinction was drawn between dangers growing out of or connected with the manner in which the business is done, and dangers incident to the service of an employee. Hence, where a blacksmith was injured when coming from a mine, where he had been performing certain work, by falling into a shaft while walking near it, it not having been protected by a fence, the danger being readily apparent, it was held that he had not assumed the risk; it was not incident to the service.⁴

3483. Where one employed as a blacksmith was suddenly called from his shop to assist in hoisting and placing in po-

¹English v. C., M. & St. P. R. Co.,
24 Fed. 906.

²Lindstrand v. Delta Lumber
Co., 68 Mich. 261.

³Fairbanks et al. v. Haentzche,
73 Ill. 236.

⁴Brazil Block Coal Co. v. Hood-
let, 129 Ill. 327.

sition a large and heavy smoke-stack, without an opportunity to examine the arrangement for doing the work, the material question was said to be whether he had sufficient knowledge to understand the hazards of the extra work, and therefore a proper question for the jury was whether, in the mode adopted for hoisting, there was required peculiar skill or knowledge to perform it with safety, though his part of the work was merely to pull on the rope. The rule of law was stated to be, that when a servant is ordered by his master to do work outside the scope of his employment, and bringing him in contact with a different class of fellow-servants, the latent risks incident to the new work are as to him extra hazards, because additional to the risks of his regular duties.¹

3484. Where it was alleged that a servant was employed as a common laborer about defendant's freight-house and yards, specially for loading and unloading freight cars, and while so employed was ordered by the superintendent or foreman of the defendant, who had the management, direction and supervision of the business and affairs of the company about the depot, to couple a car to others in a train, and such servant was unskilled and inexperienced in such work, as such foreman well knew, and such servant was killed by being crushed between the cars, caused by the negligent manner in which the engine was handled, it was said upon demurrer: When a person in the employment of another in the performance of a specific line of duty only ordinarily hazardous is commanded by a fellow-servant, but to whom he is so subordinate that he is compelled to obey his directions, to do an act in the same general service, but different from the sphere of employment in which he had been engaged to serve, and extra-hazardous in its character, and in respect to which the servant making the requirement knew he was unskilled and inexperienced, and in doing the same the servant so directed receives injuries occasioned by

¹Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 162.

the negligence of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant injured.¹

C. Services that Are Within the Employment.

3485. Where a cook upon a tug, though only nineteen years of age, but an experienced hand, was ordered by the owner and master of the tug to secure the line upon the bow of the boat, which was more dangerous than securing it to the stern in the fact only that the strain was greater, and his usual duties included the securing of the stern line, though it was part of his duties to work on the deck generally, it was held that the master had a right to send him to the bow-line, and that any dangers necessarily and universally incident to handling it were within the risks which plaintiff assumed.²

3486. Where a plaintiff was employed to do general work in an elevator, and he alleged that he was bound to obey orders in respect to that work, he cannot be heard to claim that he was only employed to work at the hoppers in unloading cars, and that it was no part of his work to assist in fastening vessels to a pier.³

3487. Where a person is employed to labor on the track of a railroad company generally, it will be presumed that it shall be at any place the company shall designate within a reasonable distance from the place of employment, and the company should not for that reason be liable for an injury received while at work at a place different from that at which he had been accustomed to work.⁴

3488. It was held that the duties of a freight conductor include, in case of an emergency, the coupling of cars.⁵

¹ *Lalor, Adm'x, v. Chicago, B. & Q. R. Co.*, 52 Ill. 401.

⁴ *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341.

² *Williams v. Churchill*, 137 Mass. 243.

⁵ *Seley v. Southern Pacific R. Co.*, 6 Utah, 319, 23 Pac. 751.

³ *Baltimore Elevator Co. v. Neal*, 65 Md. 439.

3489. Where a freight conductor was injured while uncoupling cars, which was no part of his duty, and was contrary to the defendant's rules, and there was no pressing emergency for him to perform this duty at the time, it was held it was not error to grant a new trial when a verdict was found for the plaintiff.¹

3490. Where a conductor, in the absence of the engineer and fireman, undertook to manage the engine, and a brakeman was injured while attempting to couple cars at such time, it was said: The plaintiff was put to no new or different service, and his only complaint being that, in the very service he agreed to do, he was exposed to a risk not properly belonging to it, and therefore not contemplated by his contract of service, does not entitle him to recover; that a contingency had happened that required the conductor to perform such service for the time being; that the danger of such contingency was a risk assumed. The court distinguished *Railway Co. v. Bayfield*, 37 Mich. 205.²

3491. The mere fact that the actual work a miner is engaged in at the time of receiving injury is of a different kind from that he was employed to do, but which he undertook without objection at the request of the foreman, does not prevent the application of the rule of assumed risks as to the dangers from falling ore in the mine, when such is liable to happen in the ordinary course of prosecuting the business.³

3492. Where a section-boss sent one of the section-hands, after a day's labor, to signal passing trains of danger, and in some unexplained manner he was killed, it was held that the section-boss was performing a proper and customary duty; that it had been customary for the section-hands to render this service, as they were paid extra for it, and as it was evident that the deceased undertook it willingly he could not recover.⁴

¹ *Kane v. Savannah, F. & W. R. Co.*, 85 Ga. 858, 11 S. E. 493.

² *Rodman v. Mich. Cent. R. Co.*, 55 Mich. 57.

³ *Paule v. Florence Mining Co.*, 80 Wis. 350.

⁴ *Wadling v. Newport News & M. V. R. Co. (Ky.)*, 20 S. W. 783.

3493. Where a switchman on a train, after having given signals to the engineer, was jerked from the train by the engineer suddenly putting on steam without answering the signals, and it appeared that while it was not his duty to give signals it was customary for the conductor to direct him to do so, where from the nature of the road his own signals could not be seen, and he gave the signal at this particular time without directions from the conductor, knowing the train was about to pass a town where signals were required to be given, it was held that the question whether he was acting in the line of his duty, and whether he was guilty of contributory negligence, were questions of fact for the jury.¹

D. The Effect of Obedience to Directions of Superior Servant.

3494. A negligent order falls within the rule that the master is not liable to an inferior servant whether given to the servant injured or to another servant whose act in obedience to the order causes the injury. The fact that one is a foreman or superintendent does not alter the rule.²

3495. Where the foreman directed an employee nineteen years old to perform another service than that for which he was employed (putting a hood on a planing machine, when he was employed to take lumber from the machine), and one specially dangerous, without instruction, it was held that the fault was not that of the master, but of a co-servant of the plaintiff.³

3496. Where a railroad employee of mature years and long experience is injured while coupling cars in obedience to the orders of his immediate superior, he cannot recover merely because that duty is outside the scope of his employ-

¹Hudson v. Georgia Pacific R. 159 Mass. 70; Albro v. Agawam Co., 85 Ga. 203, 11 S. E. 605; Georgia Canal Co., 6 Cush. 75; Benson v. Pacific R. Co. v. Hudson, 89 Ga. 558, Goodwin, 147 Mass. 237.
16 S. E. 70.

³Crown v. Orr et al., 140 N. Y.

²Moody v. Hamilton Mfg. Co., 450.

ment, when he makes no objection to performing it, and there is no threat of dismissal in case of refusal. *Jones v. Railway Co.*, 49 Mich. 579, disapproved.¹

3497. Where a fireman employed to tend an engine fire was called upon by the engineer to assist him in throwing on a belt, and was injured while making the effort, it was said that if the fireman employed as such was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, outside of his sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a particular or greater risk at that time, and of which he was not informed or cautioned, the master will be liable.²

3498. Where the plaintiff was hired as a common laborer, and the defendant was not present when he was put at work on a saw by the foreman, and it appeared that upon the evening of the previous day the plaintiff had asked for permission to saw up some lumber on another saw, and upon that day he had worked on a circular saw six or seven times, three of which were upon the saw that injured him, it was said that if, under these circumstances, it was negligence for the foreman to send him to work upon the saw, the negligence was that of a fellow-servant.³

3499. Where a blacksmith in the employ of the defendant was called upon to push cars upon a track and was injured by contact with a structure close to the track, it was said that if, under the circumstances stated, he was called upon by the foreman to assist in this work, which was outside of the work he was employed to do, and in a place where he had not before done such work, and if the peril was not obvious to him, and he failed to take notice that the space between the car and the building was too narrow for him to pass through with safety, and his attention was so given

¹Hogan v. Northern Pacific R. Co., 53 Fed. 519.

³O'Brien v. Rideout, 161 Mass. 170.

²Mann v. Oriental Printing Works, 11 R. I. 152.

to the work which he was doing that he did not discover the danger until it was too late to save himself, we cannot say, as a matter of law, that he must be held to have assumed the risk. The case is close.¹

3500. Where an employee of a railway company, hired to labor in a particular service and no other, was compelled by a fellow-servant of such company to labor at a business much more perilous than that which he engaged to do, and while thus engaged received injury, it was held the company was liable. This was held upon a demurrer to a complaint which alleged that the employee was engaged as a section-hand and was directed by the train-master to assist in unloading ties from a moving train.²

3501. Where a miner was ordered by his foreman to go to a place in a mine to assist another miner, and he obeyed, though against his will, and such place was one where he was not accustomed to work and not within his duties, it was held that a recovery would not be denied; that his injuries were received while performing duties outside the scope of his employment.³

3502. The rule was said to be that the master is liable when a fellow-servant, having authority over another, orders one to do any act not within the scope of his employment, whereby he is exposed to danger not contemplated by his contract of service, and he is injured by so doing.⁴

3503. Where a workman was called upon by the foreman during the noon hour to open a ventilator, and he was injured, and it appeared he had before refused to do any work outside of his regular duties at such foreman's request, but had been told by the foreman in charge of the elevator to do what such foreman called upon him to do, it was said: Whatever a workman does under competent authority for

¹ *Ferren v. Old Colony R. Co.*, 143 Mass. 197.

² *C. & G. E. R. Co. v. Harney*, 28 Ind. 28.

³ *Linderberg v. Crescent Mining Co.*, 9 Utah, 163, 33 Pac. 692.

⁴ *Gilmore v. Northern Pac. R. Co.*, 18 Fed. 866; *Thompson v. C., M. & St. P. R. Co.*, 14 Fed. 564.

the comfort and convenience of his fellow-workmen is presumed to be for his employer's benefit, and if such work is not so foreign to his employment that he would be justified in refusing to do it, the fact that he was hurt outside of working hours will not affect the rule.¹

3504. Where a person, employed as a watchman to a pile-driver train and engine, was injured by the explosion of the boiler, and the question was raised that, at the time of his injury, he was engaged in a line of duty outside the scope of his employment, at the request of his immediate superior, it was said that if the plaintiff was subject to the control of such superior, and was ordered by him to go with the engine and he obeyed, although it was not in the line of his duty as watchman, and if it was customary in the company's service to obey orders to do duty outside of their regular employment, then the plaintiff was on duty while attending the engine.²

3505. An employee of mature years who is removed from one line of employment and set at work at another without objection, and is then injured while operating machinery with which he is unfamiliar, or which he does not know how to operate, cannot recover from his employer for such injuries unless his employer knows that he did not know how to operate the machine, or, having informed his employer of his inexperience, the latter failed to instruct him. If a servant is ignorant of the method of operating machinery with which he is to work, it is his duty to inform his employer, and if he conceals his inexperience and undertakes to work with machinery with the operation of which he is unfamiliar, and is injured by reason of his inexperience, the employer is not answerable therefor. Where a servant undertakes to engage in a master's service and to perform certain duties, the master has a right to assume that he is qualified to perform the duties of the position he seeks to

¹ *Broderick v. Detroit U.*, R. S. & 68 Tex. 694, 5 S. W. 501; s. c., 72 D. Co., 56 Mich. 261. Tex. 70, 10 S. W. 298.

² *East Line & R. R. Co. v. Scott*,

occupy, and competent to apprehend and avoid all the obvious hazards of such service; and the same presumption arises where a servant, employed to perform labor in a particular branch or department of a factory, is transferred by the master to another branch or department, and assigned to do other and different work from that for which he was originally employed. It must be presumed that a servant will not undertake to perform labor or operate machinery concerning which he has no knowledge or experience. Hence his willingness to undertake the work is sufficient to warrant the master in assuming that he is competent, unless it is shown that the master knows to the contrary.¹

3506. In determining whether a servant is called upon to do work outside the scope of his employment, the question does not turn upon whether the company would be liable for the personal negligence of a superior servant. It becomes a question of authority; and if one having authority over the servant directs him to do an act outside the scope of his employment, the servant in the performance of such outside work assumes the risk only if such danger is apparent. As is said in *Bailey on Master's Liability* (p. 221), "The same duty rests upon the master as to warning and instructions as to duties within the scope of the employment; but as to temporary work outside of the employment the same presumption does not apply, to wit, that he (the servant) is competent to perform the duties of the position which he seeks, and competent to apprehend and avoid all dangers that may be discovered by ordinary care. However, he is presumed to be competent to know and comprehend obvious dangers, which require no skill or experience to appreciate, or such obvious dangers as the skill and experience he may have ought reasonably to charge him with. If, therefore, a laborer who attempts to perform a hazardous service temporarily outside of his employment, at the request of the

¹ *Arcade File Works v. Juteau* (Ind. App.), 40 N. E. 818.

master, though not objecting, is injured while performing such duty, his apparent consent alone will not defeat his right of recovery, though the danger is apparent to a person possessed of skill, but not to a common laborer."

This was said where a railroad employee, having been ordered by a superior to cut a trolley-wire crossing defendant's tracks, mounted a step-ladder placed on top of a car, and throwing his arm over the wire drew it down and cut it with a pair of nippers, the recoil throwing him to the ground and killing him. It appeared that trolley-wires were new in the locality, and that deceased was wholly unskilled in the work; that the nippers were insufficient alone for the safe performance of the duty, and deceased was given no warning except that he must hold the nippers loosely. The question whether the danger was apparent was held to be for the jury.¹

3507. Where an employee whose duties were to trim lamps on an electric tower was injured by the fall of the elevator, and it appeared that another employee had told him as he was about to ascend that the lights had already been trimmed, but the overseer directed him to go, notwithstanding such information, it was said that it made no difference whether such lamps had been trimmed that day or not. The foreman had the right to see that the work was done properly, and to direct that they be trimmed again, and it was the duty of the plaintiff to obey.²

E. Scope of Authority of the Directing Servant.

3508. A master cannot be held responsible for an act or omission of his foreman which was not connected with the business in which the foreman was employed and which did not happen in the course of his employment. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the em-

¹ Walker v. Lake Shore & M. S. R. Co. (Mich.), 62 N. W. 1032.

² Weiden v. Brush Electric Light Co., 73 Mich. 268, 41 N. W. 269.

ployment and the duties incident to it. And in determining the question of authority we are to regard the object, purpose and end of the employment.¹

3509. Where a child twelve years old was employed by the foreman of defendant's boiler shop to work in the tool-room connected therewith, and was instructed to obey the boss of that room, his work being that of cleaning tools, putting them in place, giving them to employees, and doing errands, and he was, at a time when there was no such work for him to do, sent by his boss into an adjoining room to work, and while there was directed by one of the employees of that room to assist in the working of a dangerous machine, which he did, and while so engaged was injured, and it appeared that the foreman of the boiler shop had full authority to hire and discharge hands, but that the boss of the boiler shop was merely authorized to direct the manner the work in that room was to be performed, and had no power to employ hands, it was held that the boss of the tool-room had no authority to direct the boy to seek employment in the boiler-room, and the defendant therefore was not liable for his injuries.²

3510. Where an overseer of a room in a mill imposed upon a workman labor which it was impossible for him to perform without assistance, and knowingly acquiesced in his obtaining assistance from such other workmen in the room as he chose to call, and the former in good faith, and for the purpose of performing such labor, though not in the exercise of good judgment, ordered a boy to assist him, who was unfit by reason of lack of instruction, and while rendering such assistance the latter was injured, it was held that the owner of the mill stood in the relation of master to the servant injured. The facts were that a boy fourteen years old was called to assist in working upon a machine

¹ Theisen v. Porter et al., 56 Minn. 555, 58 N. W. 265. See Morier v. Railway Co., 31 Minn. 351. ² Fisk v. Central Pacific R. Co., 72 Cal. 38.

and his hands became caught between revolving rolls in plain sight.¹

3511. Where a boy thirteen years old was employed in a factory to sweep, carry water and fill buckets with quills, and he was ordered by another employee who had no control over him (unless, as was assumed by the court, the absence of bosses in the rooms gave him such control) to assist him in mending a belt, and in so doing to occupy a dangerous position, and while so assisting the boy became caught in the revolving belts and was injured, it was held that the defendant was liable: (1) Upon the ground that by the act of its agent it exposed the boy to peril outside the ordinary risk incident to his contract of service. (2) In the attempt to run the machinery with an insufficient number of hands the occasion arose which contributed to produce, if it did not directly cause, the injury.²

3512. The presumption of law is that persons riding on construction trains, and not employed in actual service thereon or in connection therewith, are not lawfully there, and if permitted to be there by the employees of the company the presumption is against their authority to bind the company. But this presumption may be overcome, as, for instance, when the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes.³

3513. An act done by a servant while engaged in his master's work, but not done as a means of or for the purpose of performing that work, is not to be deemed the act of the master, and a person who is injured by such act, even if a negligent one, cannot recover damages of the master therefor. This was said where a boy in defendant's employ in leading a colt to water invited a small boy to ride the colt, who was injured.⁴

¹Patnode v. Warren Cotton Mills, 157 Mass. 283.

²Jones v. Old Dominion Cotton Mills, 82 Va. 140.

³Rosenbaum v. St. Paul & D. R. Co., 38 Minn. 173, 36 N. W. 447.

⁴Bowler v. O'Connell, 162 Mass. 319. The foregoing doctrine is sus-

F. The Effect of Obedience to the Request of a Servant Not Superior.

3514. Where a servant employed in defendant's coal mine, at the request of another servant, left the place where he was at work to assist a fellow-servant in propping the mine, and while so engaged was injured by falling slate, and it appeared that it was not his duty to prop the mine and that such fellow-servant had no control over him, it was said: If it was not his duty, and he was ordered to do it by one who was not authorized to command him, the company would not be liable.¹

3515. Where the master of defendant's ferry-boat used to transport cars across a river, at the request of a conductor of one of defendant's trains attempted to couple some cars and was injured, it was said that a person who voluntarily assists the servant of another in a particular emergency cannot recover from the master for an injury caused by the negligence or misconduct of such servant; he can impose no greater duty on a master than a hired servant. The same rule is applicable if a servant of his own motion, at the request of a fellow-servant, should undertake temporarily to perform the duties of a fellow-servant.²

3516. Where an employee in a mill undertakes of his own free will to make repairs outside of his regular duty on a defective pulley and belt upon the suggestion of a fellow-

tained in the following cases: *Borwick v. Eng. Joint-Stock Bank*, *Howe v. Newmarch*, 12 Allen, 49; *L. R. 2 Ex. 359*; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; 414; *Hawes v. Knowles*, 114 Mass. 518; *Levi v. Brooks*, 121 Mass. 501; *George v. Gobey*, 128 Mass. 289; *Wallace v. Merrimac R. N. & E. Co.*, 134 Mass. 95; *Walton v. New York C. S. C. Co.*, 139 Mass. 556; *Young v. South Boston Ice Co.*, 150 Mass. 527; *Mitchell v. Crossweller*, 13 C. B. 237; *Croft v. Allison*, 4 B. & Ald. 590; *Limpus v. London Genl. Omnibus Co.*, 1 H. & C. 526;

Borwick v. Eng. Joint-Stock Bank, 60 Mo. 413; *Morier v. St. P., M. & M. R. Co.*, 31 Minn. 351; *Davis v. Houghtellin*, 33 Neb. 582. ¹*Knox v. Pioneer Coal Co.*, 90 Tenn. 546, 18 S. W. 255. See, also, as sustaining the principle, *Railroad Co. v. McDaniel*, 12 Lea, 386; *Bradley v. Railway Co.*, 14 Lea, 374. ²*Osborne, Adm'x, v. Knox & Lincoln R. Co.*, 68 Me. 49.

workman who had no authority over him, and with the mere consent of his own immediate superior, and he built a staging, and just before the time for stopping the machinery for the day, while standing with his arm on the staging, facing the belt and close to it, waiting for it to stop, the belt came off, caught his arm and caused him injury, it was held that he voluntarily took the risk of an obvious danger and could not recover under the statute (Stat. 1887, ch. 270, § 1), although he was in the exercise of great care.¹

3517. Where a mechanic in a saw-mill, whose general duty it was to assist in making repairs, was directed by the operator of an appliance and machine to replace a chain which had fallen from its place on a wheel, and he was injured by contact with the unguarded knives of such machine, and it appeared the mill-wright and foreman were not present, whose duties were in connection with the directing and adjustment of machinery, and that unless the chain was adjusted the mill would have been idle during their absence, it was said that under such circumstances, to prevent a suspension of the work in the mill, the rule ought to apply which would authorize the operator of the machine to call for assistance upon any of the employees whose business it was to assist in making repairs. It was held that the evidence was sufficient to sustain a finding that he was properly engaged as a servant of defendant in the course of his employment when the accident occurred.²

G. Voluntarily Performing Service.

3518. A master is not liable for an injury sustained by a servant while performing work not in the line of his trade, and which he was not ordered to do.³

¹ *Mellor v. Merchants' Mfg. Co.*,
150 Mass. 362.

³ *Johnson v. Armour et al.*, 18
Fed. 490.

² *Mullen v. Northern Mills Co.*, 53
Minn. 29, 55 N. W. 1115.

3519. Where a boy fourteen years of age was assigned to work at a trimming-machine operated by another boy, and his duties were not in connection with the operation of the machine, but in connection with the material used, and he voluntarily, when something stopped the machine and the operator ran away, attempted to pull a cap out of the machine, and while making such effort the machine suddenly started and caught his hand, it was held there was no neglect on the part of the master which caused the injury, and therefore he could not recover.¹

3520. Where a lineman employed by a telegraph company chose a different way to reach a building than the way for which he had a license, and was injured while thus upon an adjoining building by contact with an uninsulated wire, it was held that he was not acting within the scope of his license, and therefore could not recover.²

3521. Liability of the master to a brakeman cannot be predicated upon the fact that he was with his consent changed temporarily from his position as brakeman of a freight train to that position upon a passenger train, the latter position being far less dangerous.³

3522. Where a servant, while riding upon an elevator of his employer merely for his own convenience or pleasure, was injured, it was said he was not an employee discharging duties within the scope of his employment, but at best was under an implied license, and if he was familiar with its construction and operation he accepted whatever risk there was incident to either.⁴

3523. Where an employee attempted to couple cars, which was not a duty he was required to perform, and he had been expressly directed not to attempt so to do, it was held that

¹Gillen v. Rowley, 134 Pa. St. 209.

²Hector v. Boston Electric Light Co., 161 Mass. 588.

³Adkins v. Atlantic & C. R. Co., 27 S. C. 71.

⁴O'Brien v. Western Steel Co., 100 Mo. 182.

he had no ground for recovery against the master for injuries received in attempting to perform such act.¹

3523a. Where a boy fourteen years old, employed in a tin-ware factory to operate a small foot-machine, voluntarily left his place and went to another part of the establishment to adjust a belt, and while thus engaged received fatal injuries, it was held, in an action brought by his parent against his employer, that there could be no recovery, it not appearing that any such duty was imposed upon him by the defendant's servants or agents, though it did appear that he had voluntarily performed the act on other occasions, which was not known to or sanctioned by the defendant's superintendent or foreman.²

3524. It was said: While as a general rule the servant has no claim for damages for injury received while voluntarily assuming to do something which the master did not employ him to do, yet, in case of emergency, he may of his own volition step outside of the line of his usual duties, and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is required to do, it will not of itself defeat a recovery of damages in case he is injured. Whether he is guilty of negligence is a question for the jury, and his conduct must be tried in the light of all the surroundings. Hence it was held that an engineer who left his engine in charge of the fireman, in violation of the rules of the company, and stepped on the main track and signaled the fireman to move his train on the side-track, and while thus engaged was run over and killed by a hand-car in charge of section-men, that he was not so without the scope of his employment, or negligent, but that his representatives could recover from the master damages for his death.³

¹Gardner v. Mich. Cent. R. Co.,
58 Mich. 584.

³Barry v. H. & St. J. R. Co., 98
Mo. 62.

²Daly v. Manufacturing Co., 48
La. Ann. 214, 19 So. 116.

3525. Where a fireman in the employ of the defendant was killed while attempting to uncouple cars, and the cause of death was alleged to be an insufficient number of servants, and the only proof of his being ordered to do such work was that of the engineer, who sometimes acted as conductor, to the effect that on some occasions he had directed him to uncouple cars, but could not recollect as to the time in question, it was said that unless the evidence shows that he was ordered to leave his place as fireman and engage in the other and more dangerous work of uncoupling cars, the question whether a sufficient number of hands were present is not material; and having failed to show this, there can be no recovery, for the injuries could not have happened if he had continued to perform his duties as fireman and not gone into a place of danger not within the scope of his employment.¹

3526. It was said (the facts not being given), it plainly appearing from the plaintiff's own testimony as a witness that he voluntarily and without being so ordered by any superior undertook to operate a dangerous machine with which he was unfamiliar, and that it was entirely outside the scope of his regular employment so to do, and there being no emergency which would justify a departure by him from the ordinary line of duty, he was not entitled to recover from his master, the defendant, for injuries thus occasioned, although in point of fact the machine was at the time in a defective condition.²

3527. The plaintiff's intestate was engaged in mining coal in defendant's mine. He left the room in which he was working and entered another to visit the occupants, and while there the roof gave way by reason of age and the insufficiency of props, causing his death. It was held that not being engaged in the line of his duty at the time of the injury, he stood in the same relation to the defendant as a

¹Shugart's Adm'x v. Norfolk & W. R. Co. (Va.), 22 S. E. 484.

²Central R. & B. Co. v. Chapman (Ga.), 22 S. E. 273.

visitor to the mine, and could not complain of the defendant's negligence.¹

3528. It is not the duty of a freight conductor to couple and uncouple cars except in the case of a pressing emergency, of which the jury must judge. If one such is killed while performing such service in the absence of such emergency, he is not without fault, and his widow cannot recover damages from the company.²

3529. Upon a subsequent appeal, when the lateness of the train was relied upon as being a sufficient emergency to justify the act, it was held that the plaintiff must affirmatively show that the emergency which justified the act was not due to the fault of such conductor.³

H. *Minors.*

3530. It was said that the presumption that a minor takes upon himself the risks incident to the undertaking cannot arise when the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. This was said where a boy of tender years, employed as helper on a machine and under the control of another employee, was directed by his superior to ascend a ladder to a great height from the floor among rapidly revolving and dangerous machinery for the purpose of adjusting a belt, and while making the effort his arm was caught and torn from his body. It was further said that if the person had been of mature years it might, with some plausibility, be argued that he should have disobeyed it, as he must have known its execution was attended with danger, or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. The boy, not being

¹ Wright v. Rawson, 52 Iowa, 329.

³ Central R. & B. Co. v. Sears, 61

² Sears v. Central R. & B. Co., 53 Ga. 279. See RELATION, 3253 et seq. Ga. 630; Central R. & B. Co. v. Sears, 59 Ga. 436.

able to judge for himself, had a right to rely upon the judgment of the superior who directed him.¹

3531. Where a young boy was ordered by a foreman, having control over him, to perform the dangerous service of oiling a machine while in motion, which work was outside of the employment for which he was engaged, and he was injured while so engaged, it was held an act of negligence on the part of the foreman, for which the master was responsible, to order the boy to perform such a dangerous service; that in such a case the doctrine of fellow-servant had no application; that the act required to be done, being beyond the scope of the boy's employment, under the circumstances it could not be said the danger was a risk assumed. The court approved *Railroad Co. v. Fort*, 17 Wall. 553, and distinguished *Garland v. Railroad Co.*, 67 Ill. 498.²

3532. Where a minor who was employed by the defendant as call-boy in its yard-office, whose duties among others was to deliver messages to different departments in the yard, was, while on a train with a message, requested by the yard foreman to uncouple a car, and in obeying was injured, it was held he could not recover; that he was under no obligation to obey the foreman; that he was a mere volunteer.³

3533. Where a youth nineteen years old, employed as a laborer in connection with the operation of a construction train, was directed by the conductor thereof to set brakes upon such train, and was killed while attempting the act, it was held that it was immaterial whether the direction of such servant to perform the act was or was not within the conductor's instructions, so long as the servant was within his control and subject to his directions in and about the work he was employed to do; that the servant was not called upon to disobey the order or assume the risk; that such

¹ *Railroad Co. v. Fort*, 17 Wall. 553.

³ *Texas & N. O. R. Co. v. Skinner*, 4 Tex. App. 661, 23 S. W. 1001.

² *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421.

work on the part of the boy was beyond the scope of his employment. It was subsequently said in *Wheeler v. Berry et al.* (Mich.), 54 N. W. 876, that if the plaintiff had been a man of age and experience and familiar with the work, it was clear that a recovery could not have been sustained.¹

3534. Where a boy was employed by contractors, who were engaged in railroad grading, as a water and errand boy, and he was ordered by the gang boss to remove a stick of giant powder from a fire, where it was burning, having been placed there to thaw, and was killed by an explosion, it was said that as a general rule a person entering into the employ of another is held to assume its ordinary risks; but if a boy fifteen years of age is engaged to work in an un-hazardous service, and is placed by the employer under the control of the gang boss, and such gang boss orders him to do a thing in its nature hazardous to life and limb and outside the duties of the boy, but within the scope of the employment and duties of the boss, and in the attempt to perform such act the boy is thereby killed, then the giving of such orders is negligence chargeable to the master.²

3535. Where a boy was employed in a mine with his father's consent in a certain capacity, and was afterwards without such consent changed to another less safe position, and was killed, it was held the risks of the latter were not assumed. The action was brought in the name of the parents.³

3536. A boy fourteen years old was employed to work about an elevator in a mill. Subsequently he was set at work at a picking machine, a more hazardous employment, when he was injured. The contention on the part of the plaintiff was that this of itself was sufficient to warrant a recovery, without reference to whether the act of changing

¹ C. & N. W. R. Co. v. Bayfield, 37 Mich. 204.

³ Weaver et ux. v. Iselin, 161 Pa. St. 386, 29 Atl. 49.

² Orman et al. v. Mannix, 17 Colo. 564, 30 Pac. 1037.

his work was a negligent or prudent thing to do. It was said: This proposition is wrong. In the case of an adult the employer would not be liable if such adult knew the risks, and the rule is the same as to minors if they have sufficient capacity to avoid the danger and know the danger to be avoided. Putting a minor to work becomes a matter of discretion and care to be exercised with reference to such circumstances, and the employer can only be held liable when he does not exercise such discretion and care; that is, when he is negligent.¹

¹ Anderson v. Morrison, 22 Minn. 274.

Vermont.

2425a. It was said that some courts have held that the master is responsible for the negligence of a servant who had the right to command and did command an under-servant who was injured in the performance of such command or order negligently given. This distinction, however, is not now generally recognized, nor would it seem to be a proper application of the general principles which all agree apply to the relation of master and servant in regard to injuries sustained by the latter in performing the service.¹

2425b. The master's duty is personal in respect to providing a safe place of work and appliances. It is personal in respect to maintaining appliances in repair. Hence, where a fireman was killed by the washing out of a culvert, and its defective condition would have been known to the defendant's bridge-builder and road-master if proper inspection had been exercised, it was held that the defendant was liable; that notice to such servants was notice to the defendant; that they were not fellow-servants. *Hard v. Vermont & Can. R. Co.*, 32 Vt. 473, was practically overruled.²

¹ Davis v. Central Vt. R. Co., 55 Vt. 81.

² Davis v. Central Vt. R. Co., 55 Vt. 81.

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